TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 147.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES P. GRAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MAY 11, 1914.

(24,210)

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a Supreme Court, Appellate Division, First Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Case on Appeal.

Tipple & Plitt, Esqs., Attorneys for Plaintiff-Respondent, 150 Nassau Street, New York City.
Alexander S. Lyman, Esq., Attorney for Defendant-Appellant, 3516 Grand Central Terminal Bldg., New York City.

1 Supreme Court, Appellate Division, First Department.

CHARLES P. GRAY, Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Appellant.

Statement under Rule 41.

This action was commenced by the service of a summons on November 30, 1911.
Notice of Appearance was served on November 12, 1911.
Plaintiff appeared by Tipple & Plitt, 150 Nassau St., Borough of Manhattan, City of New York.
Defendant appeared by Alexander S. Lyman, 3516 Grand Central Terminal, Borough of Manhattan, City of New York.
There has been no change of parties or attorneys since the commencement of this action.

2 *Notice of Appeal.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

SIRS: Please take notice that the defendant herein, The New York Central & Hudson River Railroad Company, hereby appeals to the Appellate Term of the Supreme Court, County of New York, from the judgment in favor of the plaintiff and against it in this action, for the sum of Eight Hundred Twenty-four and 72/100 Dollars ($824.72), entered in the office of the Clerk of the City Court of the

City of New York, on the 12th day of December, 1912, and from each and every part of said judgment.

Dated, N. Y., December 13, 1912.

Yours, etc., ALEXANDER S. LYMAN,
Attorney for Defendant.

Office & P. O. Address, 3516 Grand Central Term'l, Borough of Manhattan, City of New York.

3 To Tipple & Plitt, Esqs., Attorney- for Plaintiff, Office & P. O. Address, 150 Nassau St., N. Y. City.

And: Mr. Thomas F. Smith, Clerk, City Court, City of New York, 32 Chambers St., N. Y. City.

4 *Summons with Notice.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff.
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within six days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, November 29th, 1911.

TIPPLE & PLITT,
Attorneys for Plaintiff.

Office and Post Office Address, 150 Nassau Street, Borough of Manhattan, New York City.

5 Notice is hereby given you that upon your default to appear or answer the within summons judgment will be taken against you for the sum of Eight hundred fifty (850) dollars with interest thereon from the 1st day of January, 1906, together with the costs of this action.

TIPPLE & PLITT,
Attorneys for Plaintiff

Office and Post Office Address, 150 Nassau Street, Borough of Manhattan, New York City.

6 *Complaint.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The plaintiff above named by Tipple & Plitt, his attorneys, complains of the defendant above named and thus complaining alleges:

I. On information and belief that the defendant above named is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that it now has an office in the County of New York.

II. That on or about June 1, 1901, the plaintiff and the defendant duly entered into an agreement whereby the plaintiff agreed to prepare, furnish and deliver to the defendant a certain map for which the defendant agreed to pay to the plaintiff the sum of $1,000.00, $150.00 of said amount to be paid upon the delivery of said map to the defendant and the balance of $850 to be paid in transportation as the same might be from time to time demanded by the plaintiff from the defendant.

7 III. That thereafter and prior to August 1, 1901, the plaintiff duly prepared, furnished and delivered to the defendant said map and the defendant paid to the plaintiff said sum of $150.00 in cash.

IV. That on or about September 1, 1906, the plaintiff, in accordance with the terms of said agreement, duly demanded from the defendant certain transportation due to him from the defendant under the terms of said agreement.

V. That the defendant then declined and refused and still declines and refuses to furnish to the plaintiff said transportation so demanded, or any other transportation under said agreement or to furnish to the plaintiff any of the transportation due upon said agreement or in any other way to compensate the plaintiff for the balance due to the plaintiff from the defendant under said agreement.

VI. That the plaintiff has duly performed all things under said agreement on his part to be performed.

VII. That said map was at the time it was delivered to the defendant by the plaintiff as above set forth of the fair, reasonable and market value of $1,000.00.

VIII. That by reason of the foregoing, plaintiff has been damaged in the sum of $850.00 and there is now due and owing to the plaintiff from the defendant the sum of $850.00 with interest from September 1, 1906.

8 Wherefore plaintiff demands judgment against the defendant in the sum of $850.00 together with interest from the 1st day of September, 1906, and costs.

TIPPLE & PLITT,
Attorneys for Plaintiff.

Office and Post Office Address, 150 Nassau Street, Borough of Manhattan, New York City.

STATE AND CITY OF NEW YORK,
County of New York, ss:

Charles P. Gray, being duly sworn, deposes and says that he is the plaintiff in the above entitled action, that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES P. GRAY.

Sworn to before me this 16th day of January, 1912.
ADOLPH HANSEN,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

9 ***Answer.***

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The defendant answering the complaint of the plaintiff herein:

1. Upon information and belief, denies the allegations and each and every of them contained in the complaint of the plaintiff herein, except that defendant admits that at the times in the complaint mentioned it was and now is a domestic railroad corporation, having an office in the County of New York; that prior to August 1, 1901, plaintiff prepared, furnished and delivered to the defendant a certain map and defendant paid to plaintiff on or about said date $150.00 in cash; that on or about September 1, 1906, plaintiff demanded from defendant certain transportation which defendant declined and refused to furnish.

Second.

For a further, second and separate defense, the defendant alleges, upon information and belief, that if and in so far as it may be shown or made to appear that at any time subsequent to August 28,
10 1906, the plaintiff demanded of defendant transportation between any point within and any point without the State of New York, or transportation to be used for part of a journey between

a point within and a point without the State of New York, the defendant refused compliance with such demand upon the ground and for the reason that the granting of the transportation so demanded was against and contrary to the law governing such transportation and that if and in so far as it shall be made to appear that subsequent to the 1st day of July, 1907, plaintiff demanded of defendant transportation between points within the State of New York, the defendant refused compliance with such demand upon the ground and for the reason that the issuing of transportation so demanded was contrary to and in violation of the law governing such transportation.

Third.

For a further, third and separate defense, the defendant alleges, upon information and belief, that the cause of action, if any, stated in the complaint did not accrue within six years before the commencement of this action.

Wherefore, defendant demands that the complaint be dismissed with costs.

ALEXANDER S. LYMAN,
Attorney for Defendant.

Office & P. O. Address, 3516 Grand Central Terml., Borough of Manhattan, City of New York.

11 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, being duly sworn, says, that he is an officer of the New York Central & Hudson River R. R. Co., the defendant above named, to wit, the Treas. thereof; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 15th day of February, 1912.

J. M. WOOLDRIDGE,
Notary Public, Westchester County.

Certificate filed in New York County. New York County No. 66. New York Register No. 2147.

12 *Judgment.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

This action and the issues therein having been duly and regularly reached for trial on the calendar of this Court at a Trial Term, Part I, thereof, at the Court House in the Brownstone Building, at No. 32 Chambers Street, in the Borough of Manhattan, City and State of New York, on the 5th day of December, 1912, before Hon. Peter Schmuck, one of the justices of this Court, and a jury, and the parties having appeared by their respective counsel and the issues having been tried, and the Court having directed a verdict in favor of the plaintiff and against the defendant for Seven Hundred Forty-five and 59/100 Dollars and the costs of the plaintiff having been duly adjusted at $79 13/100.

Now, upon motion of Tipple & Plitt, attorneys for the plaintiff, it is

Adjudged, that the said plaintiff Charles P. Gray have judgment against the defendant New York Central & Hudson River
13 Railroad Company in this action, and that the said plaintiff recover of the said defendant the sum of $824 72/100 and have execution therefor.

Judgment signed and entered the 12th day of December, 1912.

THOMAS F. SMITH, *Clerk.*

14 *Clerk's Minutes.*

At a Trial Term of the City Court of the City of New York, Held at the Brownstone Building, 32 Chambers Street, City Hall Park, in the City of New York, on the 5th and 6th Days of December, A. D. 1912.

Present: Mr. Justice Peter Schmuck.

CHARLES P. GRAY
against
THE NEW YORK CENTRAL & HUDSON R. R. R. CO.

By direction of the Court, the Jury find a verdict for the plaintiff, and assess the damages at the sum of $745.59.

Motion for new trial made and thirty days' stay of execution after notice of entry of Judgment.

Sixty days to make and serve a case.

(Extract from the minutes.)

[SEAL.] THOMAS F. SMITH, *Clerk.*

15 *Case.*

City Court of the City of New York.

Trial Term, Part I.

CHARLES P. GRAY, Plaintiff,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

Before Hon. Peter Schmuck, J., and a Jury.

NEW YORK, December 5th, 1912.

Appearances:

Messrs. Tipple & Plitt, for the Plaintiff.
Arthur W. Clement, Esq., of Counsel.
Alexander S. Lyman, Esq., for the Defendant.
William Mann, Esq., of Counsel.

A Jury was duly empanelled and sworn.
Counsel for the parties opened the case to the Jury.

16 CHARLES P. GRAY, the plaintiff, being duly sworn as a witness in his own behalf, testified as follows:

Direct examination by PLAINTIFF'S COUNSEL:

My business is that of map maker and publisher. I have been in that business since 1891. My place of business is 24 Park Place, and before that it was 130 Fulton Street. Beginning with 1894, I undertook the placing of maps, representing various railroads, in various hotels of New York. I placed a map in the Buffalo office of the New York Central Railroad Company on October 28th, 1900. About two weeks later, about the middle of November, I received a letter from Mr. Thomas, who was the New York Central agent at Buffalo, who was a friend of mine. As a result of that letter Mr. Daniels's office called me up and told me the map had been taken down, and I made an arrangement to come in and see them. I saw Mr. Wolff and Mr. Daniels. Mr. Wolff was assistant to the general passenger agent. Mr. Daniels was general passenger agent of the New York Central. I saw them at Mr. Daniels's office in the Grand Central Depot, New York. Mr. Wolff started to tell me the circumstances, why the map had been taken down, because the western roads would not permit it to remain in the office. He told me they wanted a very fine map for the World's Fair, at Buffalo, to take place the following year, and he showed me a map of the Vanderbilt Lines, and told me of the space they had, the exact dimensions they would like to fill. I saw Mr. Daniels and Mr. Wolff. On the proportions of the map they furnished me I

told them off-hand the map would probably be about twelve
17 by twenty-four feet, taking in St. Louis. They told me to indicate by size the towns they would like to have painted on this big map. I itemized the canvas, how much it would cost; we used linen canvas, cost three dollars a running yard, canvas that would stand alone. I told them it would be a very expensive affair, probably run about $750. Mr. Daniels told me that $150 was all the New York Central would allow him to spend in cash for the map, without it being brought before a special meeting; they wanted the map very badly. They knew I was crowding them for transportation, using more transportation back and forth to my farm at Gerard, Pennsylvania, than our contract covered for the small hotel maps. He said they would pay me $150 in cash and the balance in transportation. Mr. Daniels said that. He informed me they could do almost anything in transportation but very little in cash on this advertising proposition. I referred to the $150 as an item that would about cover the loft hire. They sent for me again after Mr. Parry came on from Buffalo. He was city agent at Buffalo; they sent for me and we went into details. Mr. Parry, I believe it was, suggested they run the map to Omaha, instead of stopping at St. Louis, adding four feet more to the map. It was Mr. Parry's suggestion that more detail would be put into the painted map than had originally been talked of. We had several conferences at Mr. Daniels' office, and the map got under way about the 1st of February of the following year, 1901. I submitted a plan and details during January. I delivered it to the defendant's office in Buffalo. When finally completed it was twelve feet high by thirty-eight feet long, one
18 solid piece of canvas. I did everything except lettering it. I laid it out to scale, six miles to one inch, and took in the territory from Maine to Omaha. I first laid it out with pencil to accurate scale. I laid it on the floor; I was flat on the floor laying it out. It was strung up on the wall and painted in there a background of rivers and railroads; every inch of the territory was shown on the map. There were six and one-half yards of canvas. We used 150 pounds of white lead. I insured it while painting it. I paid $100.00 for loft hire. I worked ten solid weeks, personally painting it. My assistant did the lettering on the map after it had been laid out by myself. I made the chalk lines to indicate certain towns. He worked along with me at the same time. I have been in business since 1891, and have painted many maps. I have sold maps, and have bought them. I am familiar with the fair and reasonable value of maps.

Q. Basing your answer upon your knowledge acquired, and from your buying and selling maps and making them generally, and dealing in maps, what, in your opinion, was the fair and reasonable value of that map as furnished to the defendant?

DEFENDANT'S COUNSEL: I object; there was no agreement to pay the reasonable value; the only agreement was to furnish transportation except to the extent of $150, which was paid in cash.

Objection overruled, exception taken.

A. One thousand dollars when it was delivered. In September, 1906, I recall making a demand for transportation between New York and Buffalo, and return, for myself and wife. I made
19 the demand on the Passenger Department of the New York Central and Hudson River Railroad, to Mr. Root at Grand Central Depot, in New York. I did not get it. He declined to give it to me.

Cross-examination.

To Defendant's Counsel:

This demand in writing I spoke about just now, this demand on Mr. Root, was in writing.

DEFENDANT'S COUNSEL: I think we should have the letter.

By PLAINTIFF'S COUNSEL:

Q. Did you write this letter? (Indicating.)
A. I did.

PLAINTIFF'S COUNSEL: We offer it in evidence.

(Received and marked exhibit 1.)

Q. Did you receive this reply? (Indicating.)
A. Yes, sir.

Offered in evidence and marked Exhibit 2.

To Defendant's Counsel:

I sent a detailed statement showing the transportation I received from New York Central Railroad Company between 1901 and 1905 of the value of $1,225.

Q. With this letter of September 24th, 1906, you enclosed a statement showing certain transportation received from the New York Central Railroad Company?

A. No, sir; that is my statement of services rendered for the maps. It does not show what transportation I had received.

20 Q. In this letter of September 24th, 1906, you say, "I have had $350 worth of transportation, and have not called upon you for anything this year until this month." This was a letter of September 24th, 1906. When did you receive that transportation of the value of $351?

A. Various times between the date of putting up the map and the letter.

Q. Do you mean to say you received on account of this map $350 worth of transportation?

A. You understand, we had an account with the New York Central Railroad that had been running for years, for the hotel maps, and at that time it was down to seven maps. Six besides this one. This was not counted as a contract map; seven hotel maps. I mentioned $350 worth of transportation to give a detail so that the new man taking charge after Mr. Daniels left; I wanted, in a few words, to make him familiar with our dealing; he was an entirely new man in the Passenger Department. I mean I received $351 worth of

transportation on account of the hotel maps and this; whatever ran over the $150 a year would apply on the big map.

Q. Do you know how much of that $351 applied on this map, and how much on the other?

A. You have the statement connected with the letter.

Q. I thought you said it did not show—what does it show?

A. It shows a number of maps that represented service during the period in hotels and the price allowed on a particular map; the New York Central can furnish a statement to offset this with their account.

Q. Does that statement show the value of transportation
21 that the company had furnished between 1901 and 1905?

A. No, sir; that would be for the New York Central. Previous to issuing that statement they gave me a verbal statement of the amount I had. Previous to putting up the large map, they never allowed me to draw over $150.00; that was the greatest amount I was allowed for a year for the hotel maps. During 1900 I received about $250 in transportation. I have not the correct figures, no, sir; but I can give them to you. I will take their statement; I will not go back on that. The statement shown me of value of the transportation furnished me by the defendant during the year- 1901 to 1905, inclusive, seems to be about correct; I don't think there is an item there that is wrong. When I asked for transportation, I did not tell Mr. Daniels, or anybody connected with the defendant, what map it was intended to apply on. I didn't say anything about it except at the start of the account it was four maps; at that time they put to my credit $100 to be drawn. As the maps increased to six, they increased it to fifty dollars a year, making it $150 per year. I applied part of the transportation received from 1900 to 1906 in payment of this map. I have seen the complaint in this case.—I verified it. I allege $850 is due me on account of this map and that I received $150 on account. That $150 was paid me in cash in 1902. I have made an allowance for transportation received on account between 1900 and 1906. During 1900, I drew upon them very heavily; I overdrew my hotel map account. It applied on the big map at Buffalo. In the following year I drew scarcely at all, and the maps at the hotels were still running, and that overbal-
22 ance was credited on the map at Buffalo. I credited transportation I received during 1900 to 1905, inclusive, against this map; I credited against the value of this map probably $100. I rendered an exact accounting of my maps working in the hotels. That is the list that was thrown out, I believe. That list (indicating) refers to the other maps. I applied some of the transportation I received between 1900 and 1905 against this map. Between 1900 and 1905 would be several hundred dollars' accumulation from my hotel maps at the regular rate allowed me, $150 a year. If I exceeded in any one year $150 I considered that was applying on the Buffalo map. I never would have received the transportation if it had not applied on it at that time; but the final footing up shows exactly how we stand.

Q. When did you first receive transportation to apply, or when did you first apply transportation received by you against this map?

A. I suppose it would be late in the year, before September, 1900, before I had overdrawn my account. I applied something in 1900 on this map. It was substantially $100. I applied against this map during 1901, I think, perhaps $75 or $100. I cannot say how much I applied during 1902. I know how much I am suing for on account of this map. I applied practically your figures; they agree with mine, some seven hundred dollars between the dates you mentioned. It was applied against the hotel maps and the Buffalo map in service; for transportation only $150 was applied on the Buffalo map at all times. I do not know how much I applied on the Buffalo map during 1902.

Q. Do you know how much you applied during 1903?

23 A. All you have to do, you have the footings, you can deduct $150.00 from each one of those footings, and you can tell how much I applied on the Buffalo map; you have the figures there. I received during 1901 transportation on account of this map and during 1902; you have the figures there; you can verify it.

Q. Which of the transportation was applied against this map?

A. Here is $174.,—and twenty-four dollars was on the Buffalo map. Here is $141. I did not come up to the allowance. Here is $181.; in that case there was $31 applied on the Buffalo map. That is all I applied on this map. I did not demand transportation to apply on any particular map. I asked for transportation, to be charged to my account. When transportation was furnished me, I applied $150. worth of transportation on the other maps, and the balance, if any, for the whole year, was applied on this map. I received all the transportation I demanded between the date of putting up the Buffalo map and September 24, 1906. That was the first date on which I was refused transportation I asked for. On October 28th the first map was put up at Buffalo; about two weeks later I was informed the map had been taken down. Mr. Daniels told me the balance could not be paid in cash without being put before a special committee; that is all he had authority to contract for. He only had authority to give me transportation and not money for the map. He only had authority to give me money, or to pay $150. for loft hire. That $150. was paid in cash about the 10th of June, 1900. I may have made other demands for transportation after September 24th, 1906. If I did it was in writing. In May,

24 1911, I wrote a letter asking for transportation for myself and family to visit the farm at Gerard, Pa. That is the letter I wrote to Mr. Vosburg on that date. When I asked for transportation from New York to Buffalo, I was going to Gerard, Pa., fourteen miles west of Erie. The transportation that I asked for was for part of my journey from New York to Buffalo and return, I was going to Gerard, Pa.

Letter offered in evidence and marked Exhibit A.

I believe those are the only demands I made for transportation which have been refused.

To Plaintiff's Counsel:

I have looked at that statement (indicating; anything over $150, was to be applied on this map in one year. I have a statement furnished by the railroad covering the years 1900 to 1906. In 1901 I drew more than $150. The excess was $24.69. The next year I drew more than $150; was 1903; $181.08; an excess of $31.08. There were no excesses in any other year. I have received nothing only the $150. I received in cash and $55.77.

By Defendant's Counsel:

Q. When you had the conversation with Mr. Daniels, did you say anything about how much transportation you would use each year?

A. The account had been running since 1894. He started the account with $100, when we put up four large hotel maps. Within that year it was increased to $150.00; we had twelve maps
25 up; it never went beyond that; occasionally we would lose a map by fire or when a house was torn down.

Q. Did you say anything to him about how much transportation you could demand each year?

A. No, sir; he said to me; my proposition to him was for a cash proposition at the start. I held off until the first maps were put up before Mr. Daniels agreed to take part on any basis, either cash or transportation; we put up four maps; he and the other officials of the New York Central went to the different hotels and inspected them; they were very much pleased with the showing; he started me off with $100. He put it to my credit and said there was $100, placed to my credit on the four maps; during the year, as we increased it, he increased it to $150., and from year to year after that.

Q. Nothing was said about how much you could demand in a year?

A. Yes, sir.

Q. How much?

A. One hundred fifty dollars; some years when I would draw close to the line, I would want to go to the farm, and I would send a messenger up to the New York Central for transportation—it was late in the year—the information would come back that my account was overdrawn and I had to pay my fare. Some years I was furnished transportation above $150. I was entitled to $150.00 on these other maps. That was to be applied on the other maps.

Q. What was the agreement about furnishing any transportation on this map? How were you to have some transportation on account of this?

A. The Buffalo map?

Q. Yes, sir; when?

26 A. Immediately after the map was completed.

Q. As soon as you saw fit to demand it?

A. Yes, sir.

Q. They said you could only have $150.?

A. No, sir; previous to putting up the Buffalo map; I never overdrew my account after that.

Q. It was prior to 1900 you could only get $150.?
A. Yes, sir.
Q. After that, how much could you draw each year?
A. Any amount up to and including $650. or $600 due me on the Buffalo map. I mean that during any one of these years after I furnished the map at Buffalo, I could have received all transportation, and the only reason I did not get it during those years, I suppose, was I did not ask for it. I never asked for anything I could not use. I was not refused transportation after this map was put up at Buffalo. Everything I asked for was given me, and the only reason I did not get it during 1900 to 1906 was because I did not ask for it? Mr. Daniels turned me over to Mr. Root after the special map was complete, and told him I had to have anything I asked for. Mr. Daniels knew what I asked for, he could plan my trips to the farm. This transportation was to be furnished me for trips to the farm? My agreement with Mr. Daniels was, I was to have it to go to the farm. Mr. Daniels assured me previous to 1900 that $150 was placed to my credit on the hotel maps, to be drawn on for transportation. That referred to the other maps.
Q. On this map he did not tell you any certain amount was to be placed to your credit?
A. Yes, sir; the price of the map was to be $750., on which
27 they were to pay $150 cash, the balance for transportation.

By the COURT:

Q. What was the price of the map?
A. Seven hundred fifty dollars.

To Defendant's Counsel:

That conversation was about the middle of November. That was the only time when the value of the map was mentioned, except when it was finished. When the map was entirely finished, I wrote Mr. Daniels a letter telling him he had a piece of work that could not be duplicated for less than $1,000, and I asked him if he could not see his way clear to make a payment of $400 or $450 cash instead of transportation of $150. He said he would have to hold me to the original contract of $750. The original price was $750. There was some misunderstanding on account of the size; originally it was 12 x 24 and then changed in order to take in Omaha.

By the COURT:

Q. Was there anything said after the change was made in reference to any additional cost?
A. No, sir; nothing said, only after the map was finished, I wrote him a letter stating he had a piece of work that could not be duplicated for $1,000. I did not say anything with reference to the additional cost of changing the map during the time we were working on it; I would make it as they wanted it. When they changed the scope of it and the territory, I did not say anything to them indicating the price would exceed $750.

28 To Defendant's Counsel:

Nothing more was said as to the value until I wrote a letter to Mr. Daniels after it was completed. At the first conversation when they found the map was necessary and they must have it, I told Mr. Daniels it would be a $750 map and could not be put through for less. He told me the amount they could pay in cash and the balance in transportation. Nothing was said when transportation was to be given nor how much at a time. I know that Mr. Daniels is dead. He died, I believe, about three or four years ago. He always, from the very first of our acquaintance, told me that the New York Central did not pay much money for advertising, it was transportation. My proposition was an expensive one; I worked hard to get the cash instead of transportation, and he assured me that the Buffalo map would be a $750. map. He told me he would not allow, or the company will not allow him more than $150. for that purpose, unless I put it before some meeting, and go to the extra trouble to bring it up. He wanted the work to start immediately, and they paid me $150. cash and the rest in transportation.

PLAINTIFF'S COUNSEL: I offer this statement in evidence of the transportation furnished to the plaintiff produced by counsel for defendant.

DEFENDANT'S COUNSEL: I object to the statement except so far as it shows transportation applied on this map.

PLAINTIFF'S COUNSEL: I offer it for the purpose of showing that all transportation furnished between the period was furnished between points within New York not prohibited by the Interstate Commerce Act.

29 Objection sustained.

Paper marked Exhibit 3 for identification.

PLAINTIFF'S COUNSEL: We offer this paper in evidence, being the enclosure in the letter of May 19th, 1911.

DEFENDANT'S COUNSEL: I object as incompetent, immaterial and irrelevant, being merely a bill rendered by the plaintiff.

The COURT: Received only as showing demand, but not to prove the contents of the paper.

Paper marked Exhibit 4.

To Defendant's Counsel:

When I asked for this transportation from New York to Buffalo, I said I was going to Gerard, Pa. I went right through from New York to Erie. On these other trips when I had transportation I went through to Gerard on the same train. I took the train at the Grand Central Station at eight o'clock and reached Gerard at nine next morning,—it is a through train. I did not get out of it until I got to Pennsylvania, and that is true in each case where I asked for transportation from New York to Buffalo. My last letter states I desire to visit my farm in Gerard, Pa., and I asked for three tickets from New York to Buffalo. I took a through train to Gerard. I have not received any transportation since this letter of September 24th, 1906, from the New York Central. I have from other roads. In this letter of September 24th, I demanded transportation

to be charged to my account as it stood on this and all the other maps. It was not a demand on account of this particular map.

30 By PLAINTIFF'S COUNSEL:

Q. Where does the New York Central & Hudson River Railroad end between New York and Buffalo?

DEFENDANT'S COUNSEL: I object to that as incompetent.

PLAINTIFF'S COUNSEL: Will you stipulate that the road does not run beyond Buffalo?

DEFENDANT'S COUNSEL: Will you stipulate that the road does not run beyond Buffalo?

DEFENDANT'S COUNSEL: The Company itself does not operate beyond Buffalo.

—. The Lake Shore & Michigan Southern line continues from Buffalo to Gerard. I did not have a separate contract with them. I paid my fare on the Lake Shore. Sometimes I had an account with the Lake Shore & Michigan Central. I have been over the New York Central to Buffalo. It goes through Albany.

Plaintiff Rests.

DEFENDANT'S COUNSEL: I move to dismiss the complaint on the ground that at the time transportation was demanded, September 24th, 1906, and May 19th, 1911, it was contrary to the provisions of the Interstate Commerce Law for the defendant to issue transportation to the plaintiff. So far as the demand in 1911 is concerned, it would have been in violation of the Public Service Commissions Law, and the Interstate Commerce Law,—certainly, one or the other.

The COURT: Assuming for the purposes of the argument a contract as to transportation in 1900 to 1911 was in violation of the Interstate Commerce Law, and secondly, the Interstate Law and the Public Service Commissions Law, you may fortify yourself
31 with authorities whether it would have a retroactive effect on the question before us.

DEFENDANT'S COUNSEL: I have two cases I would like to have your Honor look at.

The COURT: Submit them to me when the question arises, and I will take them up tomorrow morning at 10 o'clock.

Adjourned until to-morrow morning at 10 o'clock.

NEW YORK, December 6th, 1912.

Trial Resumed:

Appearances: Same as before.

CHARLES P. GRAY, the plaintiff, recalled for further cross-examination, testified as follows:

By DEFENDANT'S COUNSEL:

Q. When you made demand on September 24th, 1906, on what train was this transportation intended to be used?

PLAINTIFF'S COUNSEL: I object as incompetent, immaterial, and irrelevant, the demand being in writing.

Objection overruled.

Exception taken.

A. I generally took the 8 P. M. train from the Grand Central Station. That is the train I usually took while going from
32 New York to Gerard. Sometimes at six o'clock, but not often. I usually took a sleeper. I bought a Pullman ticket through to Gerard, Pa., and took a berth in the sleeping car which ran through to Chicago. I traveled in the sleeper from Buffalo to Gerard, Pa.

Q. When you made demand in 1911 for transportation from New York to Buffalo to visit your farm at Gerard, Pa., the tickets you asked for in this letter, you intended to use on the six or eight o'clock train from New York to Gerard, Pa., didn't you?

Same objection, ruling and exception.

A. Probably six or eight o'clock. Both of those trains were through trains from New York to Cleveland, or Chicago. They carry a sleeping car from New York to Cleveland, Ohio or Chicago, Ill. When I traveled I purchased a sleeping car ticket at New York City through to Gerard, Pa., and traveled in the same car from New York to Gerard, Pa. I said yesterday that I considered I was entitled to $150. worth of transportation each year on account of the maps in the hotels—according to agreement. I also said something about applying the amount of transportation I received in excess of $150. against this map.

Q. As a matter of fact, you did not apply any of it against this map, did you?

A. I did, during the following year, if it was short; it was the general balance.

Q. You did not actually apply any against this map, did you?

A. We did, during the year, there is no doubt about that;
33 any year where it exceeded a $150. I certainly applied the excess. During the year 1901, I received $61.65 in transportation. I brought suit for $850. I claim the value of the map was $1,000. I admit I received a $150., and I have not applied any transportation received from 1900 to 1906 against this map. That is the way it would foot up from year to year, the four years. I am suing for $850. I claim the value of the map was $1,000, and I was paid $150. in cash in July 1901. I claim $1,000. The defendant paid me $150. cash. I am suing for $850. I have not applied any transportation received from the defendant against this map. Not to the aggregate of four years. During that time I never applied any transportation to this map. Not for four years. Nothing has been applied against this map.

To Plaintiff's Counsel: The sleeper was a Pullman car.

Q. Do you know whether the Pullman is a separate company from the New York Central.

DEFENDANT'S COUNSEL: I object to that, on the ground that he is not qualified to testify.

Objection overruled, exception taken.

A. I do.
Q. Is it a separate company?

Same objection, ruling and exception.

A. Yes, sir.
Q. And was, when you demanded transportation?
A. Yes, sir.

34 PLAINTIFF'S COUNSEL: I offer in evidence Exhibit 3 for identification.

DEFENDANT'S COUNSEL: I object as incompetent, immaterial and irrelevant, especially on the ground that the witness has just testified that none of the transportation was applied by him in payment of this map. So, it appears it refers only to the other maps.

The COURT: What do you say to that?

PLAINTIFF'S COUNSEL: Except that it has been so freely commented on.

The COURT: Yesterday, he said anything exceeding $150. was charged up against this map. To-day he has said, by some hokus-pokus arrangement he averaged for the years he received it so that some years when he got less than $150. and some years more, he balanced one against the other, saying they were all against the hotel maps.

To Plaintiff's Counsel:

I was allowed a certain sum for advertising maps. In the year 1900, I was allowed $150.

Q. Do you remember how much you were entitled to receive in 1901 on account of the hotel maps?

DEFENDANT'S COUNSEL: I object as incompetent, immaterial, and irrelevant, and not within the issues.

Objection overruled.

Exception taken.

A. $150.00.

By the COURT:

35 Q. Did you at any time after 1901, in any year, receive transportation from the defendant on this map?

PLAINTIFF'S COUNSEL: I will ask him.

To Plaintiff's Counsel:

I do not remember the exact amount of transportation I received from the defendant in 1901.

In the year 1902 I do not remember the exact amount. In 1903 I do not remember the exact amount. In 1904 I do not remember the exact amount. In the year 1905 I do not remember the exact amount. In the year 1906 I do not remember the exact amount. Nothing, I believe.

By the COURT:

Q. Look at the memorandum and say if in any year after the

consummation of this contract, you received any transportation from the defendant on account of this map,—yes or no?

A. Yes, I did.

To Plaintiff's Counsel:

In 1901 and in 1903.

Q. How much did you receive on account of this map in 1901?

DEFENDANT'S COUNSEL: I object as calling for a conclusion, and further on the ground that the witness has testified that none of the transportation was applied by him against this map.

Objection overruled.

Exception taken.

A. $24.69.

Q. How much did you receive on account of this map in the other year?

A. $31.08.

36 Q. Did you receive any other sums between the years 1901 and 1906 inclusive on account of this map?

A. No, sir.

Objected to by the defendant.

The COURT: The witness has repeatedly said he received, and charged nothing for transportation against this map. He repeats what he said, both on cross-examination and re-direct examination that he did, in these two years, 1901 and 1903 receive a little over $55. worth of transportation on this map. If you are satisfied he has sufficiently stated the fact, well and good, it is for the jury to determine.

By PLAINTIFF'S COUNSEL:

Q. What did you mean by stating this morning you did not apply any amount on this map?

A. I mean this,—in any year when I received an amount in excess of $150., that was applied for that year. The aggregate of these four years,—one year is $61.65; footing up the four years it would show nothing on the Buffalo map; that I would not have received $174. worth of transportation had it not been for the Buffalo map; I would not have received $181. worth of transportation had it not been for the Buffalo map.

DEFENDANT'S COUNSEL: I move to strike that out as a conclusion.

Motion denied.

Exception taken.

To Defendant's Counsel.

The transportation I received from 1901 to 1905 inclusive,
37 which was five years, amounted to about $750. altogether. I cannot tell you, the exact figures I have at the office; they agree with yours. It amounted to $730.29.

Q. You claim you were entitled to transportation of the value of $150. each year on account of the hotel maps?

A. Didn't allow for it each year.

Q. You offset one year against the other?
A. Yes, sir.

By the COURT:

Q. Was that the arrangement? Suppose you received $100 in one year, for hotel maps, you could receive $200, the next year?
A. Yes, sir.

To Defendant's Counsel:

Nothing was said to me by Mr. Daniels as to how the transportation I received should be applied. I applied as I saw fit.

Q. Because you did not receive for the five years from 1901 to 1905 inclusive $750, worth of transportation, you did not apply any of it received, during that time against this map, did you?
A. Not in the aggregate; no, sir.

Objected to, and overruled.

By the COURT:

Q. Yes or no?
A. I cannot answer; you will have to put it in another way.
The COURT: Ask him did he, during the existence of this contract apply any transportation on this account.

38 To Defendant's Counsel:

During the year in which I had overdrawn $150, I did apply against this map the difference between $150, and $174.69, and the following year I only received $141.22 and I offset the difference against that. The following year I received $181.08. I had a debit and credit account regardless of those sums. I did not keep the account by years. October was my fiscal year. I have no copy of my account for the different years.

Q. If you did apply during 1901 $24.69 against this map, afterwards you re-applied it against the other maps?
A. Yes, sir.
Q. And that is true also as to the $31.08?
A. Yes, sir. So at the end of 1905 I had not really applied anything on this map. If I had, during those years, applied it against this map, later on, I re-applied it against the other maps.

Q. Could you have received from Mr. Daniels, or the New York Central, more than $150, unless that difference was intended to be applied on this map?

DEFENDANT'S COUNSEL: I object to that as a conclusion.
Objection overruled.
Exception.

A. No, no, no.

By the COURT:

Q. Didn't you say in answer to a question that if in any year you received less than $150, worth of transportation on the hotel

maps, next year that difference was added to the $150. you were entitled to for the year.

39 A. Yes, sir, I meant to.

Q. And if in any year you received more than $150., and if in any year previous you have received less than $150., what did you do?

A. Each map was charged up regardless of the other.

Q. Do you say you did at any one time, charge up anything against this Buffalo map?

A. During that year.

Q. Against what did you charge all transportation you received between 1900 and 1905, against the hotel or the Buffalo map?

A. I charged nothing against the Buffalo map.

Q. At the present moment you say you charged nothing for transportation against the Buffalo map?

A. No, sir.

Plaintiff rests.

PLAINTIFF'S COUNSEL: I move to strike out all testimony brought out on the cross-examination regarding any intention of the plaintiff where he testified he intended using transportation on Interstate trains, on the ground it is a part of the defense, also on the ground the demand was in writing.

Motion denied, exception taken.

DEFENDANT'S COUNSEL: I move to dismiss the complaint on the ground that the plaintiff has not made out the cause of action alleged in the complaint, has failed to make out any cause of action against the defendant, on the ground we rightfully refused to furnish transportation or tickets or passes for the plaintiff, and his wife,

40 when demanded, September 24th, 1906, for the reason that it appears that this ticket or pass was to be used by him on an interstate train for part of an interstate journey, and that the issuance of such a ticket by the defendant at that time was illegal because of the provisions of the Interstate Commerce Act, the Act of Congress of February 4th, 1887, and as amended June 29th, 1906; on the ground that the Act made it unlawful for the defendant to furnish him transportation on any train except upon receiving from him the regular fare in money for such transportation.

The COURT: Let me ask you, do you agree that it was possible during the time, or at the time when this contract was made, by the defendant to have given him transportation upon any train which was not an Interstate Commerce train? In other words, regardless of what he was going to do with the pass, wasn't it possible for the defendant to have given him a pass upon a train, which was confined absolutely within the limits of the State of New York?

DEFENDANT'S COUNSEL: Not so long as he was going to Gerard, Pa.

The COURT: Was there any one train on defendant's line which left New York and stopped within the limits of the State of New York?

DEFENDANT'S COUNSEL: Yes.

The COURT: If you furnished him with such transportation and he intended to use it on an Interstate Commerce train, it could be refused?

DEFENDANT'S COUNSEL: Yes.

41 The COURT: Yet, if used upon such a train as I mentioned it would have been accepted?

DEFENDANT'S COUNSEL: If he had asked for transportation from New York to Buffalo, and was going only from New York to Buffalo.

The COURT: Did he ask for any other transportation but from New York to Buffalo?

DEFENDANT'S COUNSEL: From New York to Buffalo, but it was for part of an interstate journey. We knew he was going to Gerard, Pa. We knew he was a passenger from a point in New York State to a point in another State.

Motion denied, exception taken.

DEFENDANT'S COUNSEL: So far as the second demand is concerned, that was made in 1911. At that time, it was unlawful for the defendant to issue transportation.

The COURT: That is immaterial because, if there was a breach in 1906, it would make no difference whether there was a breach in 1911.

Motion denied, exception taken.

DEFENDANT'S COUNSEL: It is not claimed that he was to make one demand for the entire transportation. He did not make any demand until September 24th, 1906, and that was a demand for transportation from New York to Buffalo. No further demand was made until 1911. He did not demand all the transportation due under the agreement.

DEFENDANT'S COUNSEL: Also, no demand was made for transportation within a reasonable time. The Code provides that a

42 demand must be made to start the running of the Statute of Limitations, within a reasonable time. The agreement was made in 1901 and the first demand was September, 1906. Between those dates he could have received all the transportation which he claimed was due him, and he said he got all he asked for, and he failed to make demand until nearly six years after.

Motion denied, exception taken.

Also on the ground that the action was not commenced within the time required by Section 410 of the Code of Civil Procedure.

The COURT: When was the action started?

PLAINTIFF'S COUNSEL: The summons was served November 30th, 1911, and notice of appearance was filed the next day.

The COURT: When was the demand made?

PLAINTIFF'S COUNSEL: Within the six years.

The COURT: The motion to dismiss the complaint, on all grounds, is denied.

DEFENDANT'S COUNSEL: I take an exception on each ground. The defendant rests, and renews the motion made at the close of plaintiff's case.

Motion denied, exception taken.

PLAINTIFF'S COUNSEL: The plaintiff asks for the direction of a verdict for $850. with interest.

The COURT: You are not entitled to anything more than the difference between $150. and $750. There was an agreement to pay $750. for the map. Afterwards, there were certain changes made to extend it to Omaha. Nothing was said between the parties concerning the extra services rendered. It was made under the
43 original contract and the price was $750.; there was no promise implied or expressed to pay $1,000. for the map.

PLAINTIFF'S COUNSEL: I make a motion for the direction of a verdict for $600 plus the interest.

The COURT: You had better deduct from that the transportation he said he charged on that map.

PLAINTIFF'S COUNSEL: We will do that.

The COURT: He claims $55.77 for transportation. The defendant is not affected by anything plaintiff reduces from his demand, it does not deprive it of any rights.

DEFENDANT'S COUNSEL: I claim that the plaintiff was bound to make demand within a reasonable time. He had no right to wait five years to make the first demand, it was due within a reasonable time.

The COURT: It depends upon the circumstances what is a reasonable time; I hold, as a matter of law, six years is a reasonable time.

DEFENDANT'S COUNSEL: I take an exception to that statement.

PLAINTIFF'S COUNSEL: The interest is $201.36; we ask for a verdict for $600 less $55.77, making a total of $745.59.

The COURT: Motion granted.

DEFENDANT'S COUNSEL: I take an exception.

Thirty days' stay and sixty days to make a case, by consent.

44 PLAINTIFF'S EXHIBIT No. 1.

Long Distance Telephone, 4706 Courtlandt.
Cable Address, "Graceep."

C. P. Gray, Map Publisher,
130 Fulton Street, New York.

Copy of Letter to C. F. Daily.

Date September 24th, 1906.

Mr. C. F. Daily, Traffic Manager, New York Central & Hudson River Railroad, Grand Central Station, Manhattan, New York.

DEAR SIR: For more than fifteen years it has been a genuine pleasure for me to look after the Special Map work of your Company, from the Chairman's Office down, and you will find my Publications in nearly every room in the Grand Central Station.

Some four years ago, on account of a misunderstanding with Mr. Root, as to the style of Map desired for your Buffalo City Office; and in order that all concerned should be satisfied, I made the Passenger Department an offer to paint for them on canvas a Map of the

Vanderbilt Lines; size 12 x 30 feet, if they would agree to pay the loft hire for three months while the Map was being made, ($150.)

That Map, which I am sure you are familiar with, got my whole time and that of an expert letterer for ten solid weeks. The Map is doing service for your Company today, and is the pride of your Buffalo City Office, and can not be replaced or duplicated short of One thousand dollars.

I have also large Maps of the United States 7½ x 14¼, on which your Lines are developed in color with large title
45 (trade mark), and index, located in the following Hotels: Grand Union, New York, St. George and Margaret Hotels, Brooklyn, Patterson Spring, Saratoga; The Yates, Syracuse; Loon Lake House in the Adirondacks, and at the Hotel Atheneum, Chautauqua. For Advertising on these Maps, which have been kept clean and up to date, the Railroads pay me Fifty dollars each, for two years' service.

I have never had any contract of any kind with your Company, but have endeavored to make myself a faithful employee and have worked hard for the Vanderbilt Lines.

My returns, which have been entirely satisfactory, have been from One hundred to one hundred and fifty dollars' worth of transportation each year.

I called upon Mr. Root about September first for transportation to Buffalo and return for myself and wife, and he tells me the matter is entirely in your hands, and that his advertising propositions exclude me. Since the Map was put up at your Buffalo City Office, I have had $351 worth of transportation and have not called upon you for anything this year until this month.

I would be pleased to hear from you and trust there is some way by which one who has served you faithfully can be favored at this time.

Yours truly,

C. P. GRAY.

H. B.

46 PLAINTIFF'S EXHIBIT NO. 2.

New York Central Lines.

New York Central & Hudson River R. R., Boston & Albany R. R., West Shore R. R., Rutland R. R., New York & Ottawa R. R., St. Lawrence & Adirondack Ry.

Passenger Department,
Grand Central Station.

C. F. Daly, Passenger Traffic Manager.

NEW YORK, Sept. 27, 1906.

Mr. C. P. Gray, 130 Fulton Street, City.

DEAR SIR: Acknowledging receipt of your favor of the 24th instant.

While personally we would like to be in position to favor you with

additional transportation on account of services rendered in connection with the map work. I sincerely regret that under present conditions following passage of the Interstate Commerce Law, we are absolutely prevented from doing so, and would not be at liberty to make any further arrangements with you on transportation basis.

Again regretting our inability to favor you as desired, I am,

Very truly yours,

C. F. DALY.

W-1.

47 EXHIBIT 4.

Long Distance Telephone: 4706 Cortlandt.
Cable Address: "Graceep New York."

NEW YORK, May 19, 1911.

New York Central & Hudson River R. R. Company, Passenger Department, Grand Central Station, Manhattan, to C. P. Gray, Dr., Map Publisher, No. 130 Fulton Street (Fulton Building).

Special Maps of All Kinds Made to Order. One or a Million Copies, Delivered in the Time Required by Our Competitors to Figure on the Job. Nothing Too Large or Too Small for Us to Handle. We Mount Maps Too.

To services rendered: Balance due for work on Map for Buffalo City Office, January 1st, 1906, and agreed to be paid in transportation over New York Central R. R..... $850

48 DEFENDANT'S EXHIBIT A.

Long Distance Telephone, 4706 Cortlandt.
Cable Address, "Graceep."

C. P. Gary, Map Publisher,
130 Fulton Street, New York.

May 19th, 1911.

Mr. L. F. Vosburgh, General Passenger Agent, New York Central Lines, Manhattan, New York.

DEAR SIR: Enclosed please find bill for services rendered, which has been discussed with you in person and by letter.

In this connection, I desire to say that I leave with my family for a visit at the farm at Girard, Pennsylvania, May 27th, and if you wish to issue three return tickets, New York to Buffalo, and charge the same to my account, I shall be pleased to accept them.

Yours truly,

C. P. GRAY.

49 *Stipulation Settling Case.*

It is hereby stipulated that the foregoing case be settled, signed and ordered to be filed and annexed to the judgment roll herein.
Dated, N. Y., January 24, 1913.

TIPPLE & PLITT,
Attorneys for Respondent.
ALEXANDER S. LYMAN,
Attorney for Appellant.

Order Settling Case.

The foregoing case is hereby settled and signed by me and ordered filed and annexed to the judgment roll herein.
Dated, N. Y., January 24, 1913.

PETER SCHMUCK, *J. C. C.*

50 *Stipulation Waiving Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll, and case and exceptions as settled, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk of said County, pursuant to Section 1353, is hereby waived.
Dated, N. Y., January 24, 1913.

TIPPLE & PLITT,
Attorneys for Respondent.
ALEXANDER S. LYMAN,
Attorney for Appellant.

51 *Affidavit of No Opinion.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON R. R. R. Co., Defendant.

STATE OF NEW YORK,
County of New York, ss:

William Mann, being duly sworn, deposes and says: That he is an attorney and counselor at law and employed in the office of Alexander S. Lyman, Attorney for Defendant herein, and had charge of the above-entitled action on behalf of defendant; that no opinion was handed down by Mr. Justice Schmuck upon the trial of this action in the court below.

WILLIAM MANN.

Sworn to before me this 24th day of January, 1913.

ALBERT B. QUENCER,
Notary Public, New York County.

Certificate filed in Westchester County. New York County No. 2. New York Register No. 4003.

52 *Order Filing Record in Appellate Term.*

Pursuant to Section 1353 of the Code of Civil Procedure, it is Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Term of the Supreme Court in the First Judicial Department.

Dated, N. Y., Jan. 24, 1913.

PETER SCHMUCK, *J. C. C.*

53 *Notice of Appeal to Appellate Division.*

Supreme Court, Appellate Division, First Judicial Department.

CHARLES P. GRAY, Plaintiff-Respondent,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.

SIRS: Please Take Notice that the defendant-appellant herein hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, pursuant to an order of Honorable George L. Ingraham, a Justice of the said Appellate Division, granting to the defendant-appellant leave to so appeal, which order was duly entered in the office of the Clerk of the County of New York on the 6th day of November, 1913, a copy of which has been served upon you; from the determination and order of the Appellate Term in the above entitled case entered in the office of the Clerk of the Supreme Court in the County of New York on the 2nd day of July, 1913, affirming the judgment of the City Court of the City of New York entered in the office of the Clerk of said Court on the 12th day of December, 1912, in favor of the above named plaintiff-respondent and against the above named defendant-appellant, for $824.72, and from the order entered in the office of the Clerk of the City Court of the City
54 of New York on the 18th day of November, 1913, upon the said order of the Appellate Term, and from the judgment entered in the office of the Clerk of the City Court of the City of New York on the 19th day of November, 1913, upon the said order of affirmance for the sum of $75.28; and from each and every part of said determination and order of said Appellate Term and from each

and every part of said judgments and order of the City Court of the City of New York.

Yours, &c.,

ALEXANDER S. LYMAN,
Attorney for Defendant-Appellant.

Office & P. O. Address, 3516 Grand Central Terminal, Borough of Manhattan, New York City.

Dated Nov. 25, 1913.

To Tipple & Plitt, Esqs., Attorneys for Plaintiff-Respondent, 150 Nassau Street, New York City, and William F. Schneider, Clerk Supreme Court, and Thomas F. Smith, Clerk City Court of the City of New York.

55 *Order.*

At a Special Term of the City Court of the City of New York, Held at the Brownstone Building, No. 32 Chambers Street, Borough of Manhattan, City of New York, on the 18th Day of November, 1913.

Present: Hon. John F. McAvoy, Justice.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The above named defendant having appealed to the Appellate Term, of the Supreme Court from a judgment for the sum of Eight hundred twenty-four and 72/100 Dollars ($824.72) entered in the office of the Clerk of this Court on the 12th day of December 1912 and said Appellate Term by its order entered on the 3rd day of July 1913 having

Ordered that the aforesaid judgment so appealed from be affirmed with costs to plaintiff, and the remittitur from the said Appellate Term having been now duly filed in this Court.

Now, on motion of Tipple & Plitt, attorneys for the plaintiff it is

Ordered that the order of the said Appellate Term be and the same hereby is made the order of this Court and the aforesaid judgment appealed from be and the same is, in all respects affirmed with costs to plaintiff.

Enter.

J. F. M., *J. C. C.*

56 *Order of Affirmance of Judgment of the City Court.*

At a Term of the Supreme Court Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department, at the County Court House, in the City of New York, Borough of Manhattan, on the 2nd Day of July, 1913.

Present:
Hon. Samuel Seabury,
Hon. James W. Gerard,
Hon. Nathan Bijur,
Justices.

CHARLES P. GRAY, Pl'ff-Resp'd't,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, D'f't-App'l't.

The above named defendant in this action having appealed to the Supreme Court from a judgment of the City Court entered in the office of the Clerk of said Court on the 12th day of December, 1912, and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged, that the judgment so appealed from, be and the same are hereby affirmed; and that the Respondent recover of the Appellant the costs of the appeal.

Enter.

S. S.,
Justice S. C., Sitting in App. Term.

57 *Order on Application for Leave to Appeal from Appellate Term.*

Supreme Court, Appellate Division, First Department.

CHARLES P. GRAY, Resp't,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, App'l't.

An application having been made by the defendant to a Justice of the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the determination of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on the 3rd day of June, 1913, and the said application having come on to be heard, on reading and filing the notice of application herein, and the affidavit of William Mann in support of said application, and after hearing Mr. William Mann for the application, and Mr. Arthur W. Clement opposed,

It is ordered that said application be and the same hereby is granted.

GEO. L. INGRAHAM.

Dated, New York, October 31, 1913.

58 *Judgment.*

City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The defendant having appealed from the judgment entered herein on the 12th day of December 1912, in favor of the plaintiff Charles P. Gray, for the sum of Eight hundred and twenty-four and 72/100 Dollars ($824.72) to the Supreme Court, Appellate Term, and said appeal having been duly heard and said Appellate Term having ordered said judgment to be affirmed as hereinafter directed, with the costs of said appeal to said plaintiff and said order of the Appellate Term having been made the order of this Court by an order dated and filed the 18th day of November 1913, and said costs having been duly taxed at the sum of Seventy-five and 28/100 — upon due notice, Now, on motion of Tipple & Plitt, attorneys for the plaintiff Charles P. Gray, it is

Ordered and Adjudged that said judgment so appealed from be and the same is hereby in all things affirmed and that plaintiff Charles P. Gray, recover of the defendant, The New York Central & Hudson River Railroad Company the sum of Seventy-five — 28/100 dollars costs as taxed, and have execution accordingly.

Judgment this 19th day of November 1913.

THOMAS F. SMITH, *Clerk.*

59 *Stipulation Waiving Certification.*

Supreme Court, Appellate Term, First Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the record on appeal to the Appellate Term, of the order of affirmance of judgment of the City Court, judgment of affirmance, the order for leave to appeal therefrom, and all the papers upon which the Court below acted in making the order

appealed from, and the whole thereof, now on file in the office of the Clerk of the Supreme Court in the first Department.

Certification thereof in pursuance of Sections 1353 and 3194*a* of the Code of Civil Procedure is hereby waived.

Dated, Dec. 16, 1913.

TIPPLE & PLITT,
Attorneys for Pl'ff-Resp.
ALEX. S. LYMAN,
Attorney for Def't-App.

60 *Affidavit of No Opinion.*

Supreme Court, Appellate Term, First Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

STATE OF NEW YORK,
County of New York, ss:

William Mann, being duly sworn, deposes and says that he is an attorney and counselor at law and employed in the office of Alexander S. Lyman, attorney for the defendant-appellant herein, and has charge of the above entitled action on behalf of the defendant-appellant; that no opinion was handed down by the justices of the Appellate Term upon the affirmance of the judgment of the City Court herein.

WILLIAM MANN.

Sworn to before me this — day of December, 1913.
J. M. WOOLDRIDGE,
Notary Public, Westchester County.

Certificate filed in New York County.
New York County No. 63.
New York Register No. 4166.

61 At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 6th Day of February, 1914.

Present:

Hon. George L. Ingraham, P. J.,
Hon. Frank C. Laughlin,
Hon. John Proctor Clarke,
Hon. Francis M. Scott,
Hon. Henry D. Hotchkiss,
Justices.

5313.

CHARLES P. GRAY, Respt.,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Applt.

Affirmance of Order.

An appeal having been taken to this Court by the defendant from a determination of the Supreme Court Appellate Term entered on the 2nd day of July, 1913, and said appeal having been argued by Mr. William Mann of counsel for the appellant and by Mr. Arthur W. Clement of counsel for the respondent; and due deliberation having been had thereon, it is hereby ordered that the determination so appealed from be and the same is hereby affirmed with costs and disbursements.

Enter:

G. L. I.

62 Please take notice that the within is a copy of an order this day duly entered and filed in the office of the Clerk of the Appellate Division.

Dated, New York, Feb. 6, 1914.

Yours, &c.,

TIPPLE & PLITT,
150 *Nassau Street, Borough of Manhattan, New York City, Attorneys for Pl'ff.*

To Alex. S. Lyman, Esq., Attorney for D'f't.

[Endorsed:] Supreme Court, New York County. Charles P. Gray, Plaintiff, against New York Central & Hudson River Railroad Company, Defendant. Order and Notice. Tipple & Plitt, Attorneys for Plaintiff, 150 Nassau Street, Borough of Manhattan, New York City.

63 At a Special Term, Part I, of the City Court of the City of New York, Held at the Brown Stone Building, No. 32 Chambers Street, Borough of Manhattan, City of New York, on the 16th Day of February, 1914.

Present: Hon. Edward B. La Fetra, Justice.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The above named defendant having appealed to the Appellate Division of the Supreme Court, First Judicial Department, pursuant

to an order of Honorable George L. Ingraham, a Justice of the said Appellate Division, granting to the defendant appellant leave to so appeal, which order was duly entered in the office of the Clerk of the County of New York, on the 6th day of November, 1913, from the determination and order of the Appellate Term in the above entitled case entered in the office of the Clerk of the Supreme Court, in the County of New York, on the 2nd day of July 1913, affirming the judgment of the City Court of the City of New York, entered in the office of the Clerk of said Court on the 12th day of December 1912, in favor of the above named plaintiff-respondent and against the above named defendant-appellant for $824.72 and from the order entered in the office of the Clerk of the City Court of the City of New York, on the 18th day of November 1913, upon the said order of the Appellate Term, and from the judgment entered in
64 the office of the Clerk of the City Court of the City of New York on the 19th day of November, 1913; upon the said order of affirmance for the sum of $75.28; and from each and every part of said determination and order of said Appellate Term and from each and every part of said judgment and order of the City Court of the City of New York, and said Appellate Division by its order entered on the 6th day of February 1914 having,

Ordered that the determination so appealed from be affirmed with costs to plaintiff and a certified copy of said order from the said Appellate Division having been now duly filed in this Court,

Now, on motion of Tipple & Plitt, attorneys for the Plaintiff it is

Ordered that the order of said Appellate Division be and the same hereby is made the order of this Court and the aforesaid judgment appealed from be and the same are, in all respects affirmed with costs and disbursements to plaintiff.

Enter:

E. B. L., *J. C. C.*

65 Please take notice that the within is a copy of an order this day duly entered and filed in the office of the Clerk of the City Court of the City of New York.

Dated, New York, Feb. 16, 1914.

Yours, &c.,

TIPPLE & PLITT,
150 *Nassau Street, Borough of Manhattan,*
New York City, Attorneys for Plaintiff.

To Alex. S. Lyman, Esq., Attorney for D'f't.

[Endorsed:] City Court of the City of New York. Charles P. Gray, Plaintiff, against The New York Central & Hudson River Railroad Company, Defendant. Notice of Entry and Order. Tipple & Plitt, Attorneys for Plaintiff, 150 Nassau Street, Borough of Manhattan, New York City.

66 City Court of the City of New York.

CHARLES P. GRAY, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

The defendant having appealed from the judgment entered herein on the 12th day of December 1912, in favor of the plaintiff Charles P. Gray for the sum of eight hundred and twenty-four and 72/100 Dollars ($824.72) and from the determination and order of the Appellate Term, entered in the office of the Clerk of the Supreme Court in the County of New York, on the 2nd day of July, 1913, and from the order entered in the office of the Clerk of the City Court of the City of New York, on November 18, 1913, and from the judgment entered November 19th, 1913 to the Appellate Division, Supreme Court, and said appeal having been duly heard and said Appellate Division having ordered said judgment to be affirmed as hereinafter directed, with the costs of said appeal to said plaintiff and said order of the Appellate Division having been made the order of this Court by an order dated and filed the 16th day of February 1914, and said costs having been duly taxed at the sum of $69.75 upon due notice,

Now, on motion of Tipple & Plitt, attorneys for the plaintiff Charles P. Gray, it is

Ordered and Adjudged that said judgment so appealed from be and the same is hereby in all things affirmed and that plaintiff Charles P. Gray, recover of the defendant The New York
67 Central & Hudson River Railroad Company the sum of $69.75 costs as taxed, and have execution accordingly. Judgment this 18 day of February 1914.

THOMAS F. SMITH, *Clerk.*

68 Please take notice that the within is a copy of a judgment this day duly entered and filed in the office of the Clerk of the City Court of the City of New York.

Dated, New York, February 18, 1914.

Yours, &c.,

TIPPLE & PLITT,
150 *Nassau Street, Borough of Manhattan,*
New York City, Attorneys for Plaintiff.

To Alex. S. Lyman, Esq., Attorney for Defendant.

[Endorsed:] City Court of the City of New York. Charles P. Gray, Plaintiff, against The New York Central & Hudson River Railroad Company, Defendant. Judgment & Notice. Tipple & Plitt, Attorneys for Plaintiff, 150 Nassau Street, Borough of Manhattan, New York City.

69 At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 27th day of February, 1914.

Present:

Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" John Proctor Clarke,
" Francis M. Scott,
" Henry D. Hotchkiss,
Justices.

CHARLES P. GRAY, Resp't,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, App'l't.

Order Denying Leave to Appeal to the Court of Appeals.

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 6th day of February, 1914.

Now upon reading and filing the notice of motion with proof of due service thereof and the affidavit of William Mann in support of said motion and after hearing Mr. William Mann for the motion and Mr. Arthur W. Clement opposed

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

70 Appellate Division of the Supreme Court, First Judicial Department.

Clerk's Office, County of New York.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 27th day of February 1914.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 27th day of April 1914.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

[Endorsed:] Appellate Division of the Supreme Court, First Judicial Department. Order denying leave to appeal to the Court of Appeals.

71 Supreme Court, Appellate Division, First Judicial Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Order Allowing a Writ of Error.

The above entitled matter coming on to be heard upon the petition of the Appellant therein for a Writ of Error from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and upon an examination of the said petition and the record in the said matter,

It is ordered, that a Writ of Error be, and hereby is, allowed to this Court from the Supreme Court of the United States and that the petitioner file a bond in amount of $3,000, and that the said Writ of Error operate as a supersedeas.

Granted this 30th day of March, 1914.

GEO. L. INGRAHAM,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

72 Supreme Court of the State of New York, Appellate Division, First Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Petition for a Writ of Error from the Supreme Court of the United States.

To the Honorable George L. Ingraham, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department:

The petition of the New York Central and Hudson River Railroad Company respectfully shows:

1. That your petitioner at and during all the times mentioned in the record herein was and now is a domestic railroad corporation of the State of New York, doing business as a common carrier of persons and property between points within the State of New York and points in other states, and was and now is subject to the provisions of the act of Congress of February 4th, 1887, known as the Act to Regulate Commerce and the acts amendatory thereof and supplementary thereto.

2. That this action was commenced in the City Court of the City of New York to recover damages for alleged breach of contract. The complaint alleges that on or about June 1st, 1901, the plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to prepare and deliver a certain map for which the
73 defendant agreed to pay the plaintiff one thousand dollars ($1,000.), of which sum one hundred and fifty dollars ($150.) was to be paid upon delivery of the map and the balance of eight hundred and fifty dollars ($850.) was to be paid in passenger transportation to be used on journeys between points in different states as the same might be demanded by the plaintiff; that the plaintiff prepared and delivered said map prior to August 1st, 1901; that on or about September 1, 1906, the plaintiff, in accordance with the terms of said agreement demanded transportation from the defendant which the defendant then declined and still declined to furnish.

3. In its answer, the defendant admitted that it refused to furnish the transportation demanded by the plaintiff in September, 1906, and alleged that the reason for such refusal was that the furnishing of such transportation would have been in violation of law.

4. At the close of the trial, the defendant, your petitioner moved to dismiss the complaint upon the ground that the act of Congress, approved February 4, 1887, known as the Act to Regulate Commerce, and the acts amendatory thereof and supplementary thereto, prohibited the defendant from transporting the plaintiff, or furnishing the plaintiff with tickets or passes entitling him to be transported by the defendant on its railroad, pursuant to the terms of said agreement, and that on and after August 28, 1906, it was unlawful for the defendant, under the provisions of said act, to transport the plaintiff or to furnish the plaintiff with tickets or passes
74 entitling him to be transported by the defendant on its railroad as part of one or more continuous journeys, beginning at a point in one state and terminating at a point in another state, unless the defendant received for such transportation the regular published fare in money. The said motion of the defendant was denied and the learned Trial Justice directed a verdict for the plaintiff and judgment was entered on that verdict. Thereupon the defendant, your petitioner, duly appealed to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department which said Appellate Term duly affirmed the said judgment of the said Court without writing an opinion setting forth its reasons therefor. Thereafter the defendant, your petitioner, duly applied to a Justice of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department for leave to appeal from the order of the Appellate Term aforesaid to the said Appellate Division, which said application was duly granted. Thereupon the defendant, your petitioner, duly appealed to the said Appellate Division from the said order and determination of the Appellate Term aforesaid, and the said Appellate Division duly affirmed the said order and determination of the said Appellate

Term (Presiding Justice Ingraham dissenting), without writing an opinion setting forth its reasons therefor. Thereafter and on February 18th, 1914, judgment was entered in the City Court of the City of New York on the said order and determination of the said Appellate Division in favor of the plaintiff against the defendant, your petitioner.

5. Thereafter and on the 20th day of February, 1914,
75 a motion was duly made by the defendant, your petitioner, to the said Appellate Division for leave to appeal to the Court of Appeals of the State of New York, which motion was denied by the said Appellate Division on February 27th, 1914. Under the statutes of the State of New York, in such case made and provided, no appeal could be taken to a higher court of the State of New York without such leave to appeal.

6. Your petitioner further respectfully shows to the Court that in the record and proceedings had in the above entitled action, and also in the rendition of the final order and judgment in the Appellate Division of the Supreme Court, the Appellate Term of the Supreme Court and the City Court of the City of New York, there were drawn in question a title, right, privilege and immunity specially set up and claimed by your petitioner under a statute of the United States; namely, the Act to Regulate Commerce of February 4th, 1887, and the acts amendatory thereof and supplementary thereto, and that the decisions of the said Courts were adverse to such title, right, privilege and immunity so set up and claimed by your petitioner under said statute.

7. Your petitioner further respectfully shows that in the record and proceedings herein there is manifest error and your petitioner attaches hereto and makes a part hereof its assignments of such errors.

Wherefore, your petitioner prays that a Writ of Error may be allowed to issue from the Supreme Court of the United States to
the Appellate Division of the Supreme Court of the State
76 of New York for the First Judicial Department in order that the errors set forth may be corrected and that the decision and judgment may be reversed and that an order be entered fixing the amount of a supersedeas bond and that a duly authenticated transcript of the record and proceedings herein may be sent to the Supreme Court of the United States.

ALEXANDER S. LYMAN,
Attorney for Defendant-Appellant.

Office and Post Office Address, 3514 Grand Central Terminal, Borough of Manhattan, City of New York.

77 Supreme Court, Appellate Division, First Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Assignment of Errors.

Now comes the defendant-appellant (plaintiff in error) in the above entitled case and in connection with its petition for a Writ of Error from the Supreme Court of the United States, makes this its assignment of error:

1. The Appellate Division of the Supreme Court of the State of New York for the First Judicial Department erred in affirming the determination and order of the Appellate Term of the said Supreme Court and the judgment of the City Court of the City of New York, entered upon such order and determination.

2. The said Appellate Division erred in not reversing the said determination and order of the Appellate Term of the Supreme Court and the judgment of the City Court of the City of New York, entered upon such order and determination.

3. The said Appellate Division erred in failing to hold that the agreement entered into between the plaintiff and the defendant in the year 1901 purported to obligate the defendant to transport the plaintiff or to furnish him with tickets or passes entitling him to be transported by the defendant on its railroad within the
78 State of New York, as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state, and was, therefore, subject to the provisions of the Act of Congress approved February 4, 1887, known as the Act to Regulate Commerce, and the acts amendatory thereof and supplemental thereto and in particular the act of Congress approved June 29, 1906.

4. The said Appellate Division erred in holding that on and after August 28th, 1906, it was not unlawful and violative of the said acts of Congress for the defendant to transport the plaintiff or to furnish him with tickets or passes entitling him to be transported by the defendant on its railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state unless defendant received money in payment therefor.

5. The said Appellate Division erred in holding that the defendant did not rightfully refuse to transport plaintiff or to furnish the plaintiff with tickets or passes entitling him to be transported on defendant's railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state as demanded by the plaintiff, in September, 1906, in part payment of the map furnished by him to the defendant.

6. The said Appellate Division erred in holding that the refusal of the defendant to transport plaintiff or to furnish him with tickets

or passes entitling him to be transported by the defendant on its railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state, as demanded by plaintiff in September, 1906, was a breach on the part of the defendant of the terms of the agreement mentioned in the complaint.

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7. The said Appellate Division erred in holding that the enactment and the going into effect of the act of Congress, hereinbefore mentioned, approved June 29, 1906, did not operate as a cancellation of the said contract between the parties to the above entitled action.

8. The said Appellate Division erred in holding that the enactment and the going into effect of the act of Congress, hereinbefore mentioned, approved June 29, 1906, did not exonerate, excuse and release the defendant from any continued, further or additional liability to the plaintiff under or in respect of the said contract between the parties to the above-entitled action.

9. By reason and in view of the enactment and going into effect of the Act of Congress, approved June 29, 1906, hereinbefore mentioned, the said Appellate Division erred in holding that in this action the plaintiff herein was entitled to recover any damages of and from the defendant for an alleged breach of contract.

Wherefore, The New York Central and Hudson River Railroad Company prays that the said judgment, final order and determination may be reversed, annulled and set aside, and that the said defendant-appellant may be restored to all things which it has lost because of the said judgment, final order and determination.

ALEXANDER S. LYMAN,
Attorney for Defendant-Appellant.

Office & P. O. Address, 3514 Grand Central Terminal, New York City.

80

STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter being duly sworn, says, that he is an officer of the New York Central and Hudson River Railroad Co. the petitioner above named, to wit, the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 30th day of March, 1914.

[Seal J. M. Wooldridge, Notary Public, Westchester County.]

J. M. WOOLDRIDGE,
Notary Public, Westchester County.

Certificate filed in N. Y. County, No. 63, New York Register No. 4166.

81 [Endorsed:] Supreme Court, State of N. Y., Appellate Division, 1st Dept. County Clerk's Index No. —, Year 191–. Charles P. Gray, Plaintiff-Resp., against The New York Central & Hudson River R. R. Co., Defendant-App'l't. Petition for Writ of Error from Supreme Court of United States, Assignment of Errors and Order allowing a Writ of Error. Alex. S. Lyman, Attorney for Def't-App'l't, 3516 Grand Central Terminal, Borough of Manhattan, New York City. To —— ——, Attorney for —— —— Service of a copy of the within papers is hereby admitted. Dated April 7, 1914. Tipple & Plitt, Attorneys for Resp't.

82 In the Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,
against
CHARLES P. GRAY, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York for the First Judicial District and Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea in the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, being the highest court of law of the said state in which a decision could be had in the said suit between Charles P. Gray, plaintiff, and the New York Central and Hudson River Railroad Company, defendant, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege and immunity specially set up or claimed under such statute, a manifest error hath happened, to the great damage of the said New York Central and Hudson River Railroad Company, as by its petition appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
83 together with this writ, so that you have the same at Washington on the 28th day of April, 1914, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 7th day of April, 1914.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court for the Southern District of New York.

Allowed this 6th day of April, 1914.

GEO. L. INGRAHAM,
Presiding Justice of the Appellate Division of the Supreme Court, First Department.

84 [Endorsed:] In the Supreme Court of the United States. The New York Central and Hudson River Railroad Company, Plaintiff in Error, against Charles P. Gray, Defendant in Error. Writ of error. Alexander S. Lyman, Attorney for Plaintiff in Error. Office & P. O. Address, 3516 Grand Central Terminal, New York City. Service of a copy of the within writ of error is hereby admitted. Dated New York, April 7, 1914. Tipple & Plitt, Attorneys for def't in error.

85 UNITED STATES OF AMERICA, *ss:*

To Charles P. Gray, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, wherein the New York Central and Hudson River Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George L. Ingraham, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, this 30th day of March, in the year of our Lord One Thousand Nine hundred and Fourteen.

GEO. L. INGRAHAM,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York.

86 [Endorsed:] Supreme Court of the United States. County Clerk's Index No. —. Year 191-. The New York Central and Hudson River Railroad Co., plaintiff in error, plaintiff, against Charles P. Gray, defendant in error, defendant. Citation. Alex. S. Lyman, attorney for plaintiff, 3516 Grand Central Terminal, Borough of Manhattan, New York City. Service of a copy of the within citation is hereby admitted. Dated April 4, 1914. Tipple & Plitt, attorney- for defendant in error.

87 Supreme Court, Appellate Division, First Judicial Department.

CHARLES P. GRAY, Plaintiff-Respondent,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Know all men by these presents: That we, The New York Central & Hudson River Railroad Company, as principal, and The National Surety Company of New York, as surety, are held and firmly bound unto Charles P. Gray, in the sum of Three Thousand ($3,000) Dollars, to be paid to the said obligee, his executors or administrators, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of March, 1914.

Whereas the above named defendant-appellant hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department.

Now, therefore, the condition of this obligation is such that if the above named defendant-appellant shall prosecute its said writ of error to effect and answer all costs and damage if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
[SEAL.] By A. H. SMITH, *President.*
88 THE NATIONAL SURETY COMPANY,
By W. C. ARMITAGE, *Vice President.*

Attest:
J. R. WELLS,
[SEAL.] *Assistant Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 31st day of March, 1914, before me personally came A. H. Smith to me personally known and known to me to be President of The New York Central & Hudson River Railroad Company, one of the corporations described in and which executed the foregoing instrument as principal, who being by me duly sworn, did depose and say: That he resides in Chappaqua in the State of New York that he is President of the said New York Central and Hudson River Railroad Company, and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of said company and was affixed thereto by authority of the Board of Directors of said company, and that he signed his name thereto by the like authority as President of said company.

[SEAL.] J. M. O'MAHONEY,
Notary Public, New York County, No. 2911.

89 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 31st day of March one thousand nine hundred and 14 before me personally came W. C. Armitage, known to me to be the Vice President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of The New York Central and Hudson River Railroad Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of The New York Central and Hudson River Railroad Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company that he signed his name thereto by like order and authority as Vice President of said Company; that he is acquainted with J. R. Wells and knows him to be the Assistant Secretary of said Company; that the signature of said J. R. Wells subscribed to said Bond is in the genuine handwriting of said J. R. Wells, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2,000,000) dollars.

W. C. ARMITAGE.
(Deponent's Signature.)

90 Sworn to, acknowledged before me, and subscribed in my presence this 31st day of March, 1914.

[NOTARIAL SEAL.] H. E. EMMETT.
(Officer's Signature, Description and Seal.)

Approved April 6th, 1914.
GEO. L. INGRAHAM.

91 [Endorsed:] Supreme Court, Appellate Division, First Judicial Department. Charles P. Gray, Plaintiff-Respondent, against The New York Central and Hudson Rever Railroad Company, Defendant-Appellant. Appeal Bond. Alexander S. Lyman, Attorney for Defendant-Appellant, Office & P. O. Address 3516 Grand Central Terminal, New York City, New York. Service of a copy of within bond and notice is hereby admitted April 7, 1914. Tipple & Plitt, Att'ys for Pl'f-resp't. Sirs: Please take notice that the within is a copy of bond filed in the office of the clerk of the Appellate Division, First Department, April 6, 1914. N. Y. April 7, 1914. Alex. S. Lyman, Att'y for defendant-appellant. To Messrs. Tipple & Plitt, Att'ys for Pl'f, New York.

92 UNITED STATES OF AMERICA:

Appellate Division of the Supreme Court, First Judicial Department, Clerk's Office.

COUNTY OF NEW YORK,
State of New York, ss:

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered 1 to 66 contain a true and complete transcript of the record and proceedings had in the cause of Charles P. Gray, plaintiff and respondent, in said Court, and defendant in error in the United States Supreme Court, against the New York Central & Hudson River Railroad Company, defendant and appellant, in said first named Court and plaintiff in error in the United States Supreme Court, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the affidavits in error and copy of the appeal bond, constitute the return of the said writ of error.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed at the Court House of the Supreme Court for the First Judicial Department in the County of New York and have hereunto set my hand this — day of May, A. D. 1914.

[Seal Supreme Court, Appellate Division, First Department.]

ALFRED WAGSTAFF, *Clerk*.

Endorsed on cover: File No. 24,210. New York Supreme Court. Term No. 147. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. Charles P. Gray. Filed May 11, 1914. File No. 24,210.

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JAMES D. MAHER

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 147.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

against

CHARLES P. GRAY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

against

CHARLES P. GRAY,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The defendant in error, Charles P. Gray, brought an action in the City Court of the City of New York against the plaintiff in error to recover damages for alleged breach of contract.

The complaint alleges that on or about June 1, 1901, the plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to prepare and deliver to the defendant a map for which the defendant agreed to pay to the plaintiff $1000.00, of which amount $150.00 was to be paid upon delivery of the map and the balance of $850.00 was to be paid in transportation from time to time as the same might be demanded by the plaintiff; that the plaintiff thereafter and prior to

August 1, 1901, prepared and furnished the map, and the defendant paid to the plaintiff $150.00 in cash on account thereof; that on or about September 1st, 1906, plaintiff demanded certain transportation from the defendant due him under said agreement, and that defendant declined and refused to furnish same (Record, page 3).

The answer is a general denial except that it admits the delivery of the map to the defendant, the payment by it of $150.00 in cash and the demand of the plaintiff and the refusal of the defendant to furnish transportation in September, 1906, and sets up as a second defense that subsequent to August 28, 1906, it was unlawful for the defendant to furnish transportation to the plaintiff to be used for an interstate journey, and that on and after July 1st, 1907, it was unlawful for the defendant to furnish such transportation for a journey between points within the State of New York, and as a third defense alleges that the cause of action did not accrue within six years prior to the commencement of the action (Record, p. 4).

The defendant in error is engaged in business as a map publisher. Beginning in 1894 he undertook the placing of maps, representing various railroads, in hotels in New York and other cities, and in the year 1900 had an account with the plaintiff in error which had been running since 1894 under which he was entitled to receive from it transportation of the value of $150. per year for twelve other maps which he had placed in various hotels at the request of plaintiff in error for advertising purposes (Record, p. 12).

In November, 1900 at the time the agreement involved herein was entered into, he was calling upon the plaintiff in error for more transportation for use in traveling between New York City and his farm at Gerard, Pa., than he was entitled to receive under his contract for the twelve hotel maps (Record, p. 8).

About the middle of November, 1900, he had a conversation with Mr. Daniels, General Passenger Agent, and Mr. Wolff, Asst. General Passenger Agent of the New York Central and Hudson River Railroad Company, plaintiff in error, during which conversation they told him they wanted a very fine map of the Vanderbilt Lines for the World's Fair at Buffalo, which was to take place the following year. After making an estimate of the cost of the map, defendant in error told Mr. Daniels that the map would cost about $750. Mr. Daniels told him that $150. was all the company would allow him to spend in cash for the map without bringing the matter before a special meeting; that he could do almost anything in transportation, but very little in cash on advertising propositions, (Record, pp. 7-8, 11).

The price of the map as finally agreed upon was $750. of which $150. was to be paid in cash to cover the expense of loft hire while the map was being painted and the balance was to consist of transportation to be used by the defendant in error in traveling between New York City, N. Y. and his farm in Gerard, Pa. (Record, pp. 11, 13-14). Defendant in error made and delivered the map and was paid $150. in cash in 1900 or 1902 (Record, pp. 10-11). When the map was completed, Mr. Daniels instructed one of his employes to deliver to defendant in error on account of this map transportation as and when he demanded the same up to $600. in value (Record, p. 13). From 1900 to September, 1906 all the transportation which defendant in error demanded was furnished him, and he concedes that the only reason he did not receive all the transportation due him on account of this map, prior to September, 1906, was because he did not ask for it (Record, p. 13). Between 1901 and 1905, inclusive, defendant in error demanded from plaintiff in error and received from it transportation of the value of $730.29.

The only part of that transportation which was credited to the account of this map was the value of transportation which he received in excess of $150. during the years 1901 and 1903, the amount to which he was entitled for each of those years on account of the hotel maps (Record, pp. 16, 18, 19).

In September, 1906, defendant in error demanded transportation from New York to Buffalo and return for himself and wife, which was refused. This demand is contained in a letter dated September 24, 1906 to Mr. C. F. Daly, then Passenger Traffic Manager of the plaintiff in error (Record, pp. 9, 22-23). In reply to this letter Mr. Daly advised him that the transportation could not be furnished because of the passage of the Interstate Commerce Law which prohibited the plaintiff in error from making any further arrangements with him on a transportation basis (Record, pp. 23-24). On May 11, 1911, defendant in error wrote a letter to Mr. L. F. Vosburgh, General Passenger Agent advising that he intended visiting his farm at Gerard, Pa., and asking for three return tickets New York to Buffalo, to be charged to his account, which were not furnished (Record, p. 24).

Those are the only demands which he made for transportation which were refused (Record, page 11). And those demands were for transportation from New York to Buffalo, N. Y., to be used on an interstate journey from New York to Gerard, Pa., and in traveling between those points defendant in error took a through car at New York City to Erie, Pa., or Gerard, Pa. Each of the trains on which he traveled carried through sleeping cars from New York City to Cleveland, Ohio, and Chicago, Ill. The demand which was made for transportation in September, 1906 was for transportation to be used on one of those trains (Record, pp. 14-16). The Lake Shore and Michigan Southern Railway connected with the railroad of The New

York Central and Hudson River Railroad Company at Buffalo. Defendant in error sometimes obtained free transportation from the Lake Shore & Michigan Southern Railway Company and at other times paid his fare over that road between Buffalo and Gerard (Record, p. 15).

At the close of the case, plaintiff in error moved to dismiss the complaint upon the following ground:

> "Defendant's Counsel: I move to dismiss the complaint on the ground that the plaintiff has not made out the cause of action alleged in the complaint, has failed to make out any cause of action against the defendant, on the ground we rightfully refused to furnish transportation or tickets or passes for the plaintiff, and his wife, when demanded, September 24th, 1906, for the reason that it appears that this ticket or pass was to be used by him on an interstate train for part of an interstate journey, and that the issuance of such a ticket by the defendant at that time was illegal because of the provisions of the Interstate Commerce Act, the Act of Congress of February 4th, 1887, and as amended June 29th, 1906; On the ground that the Act made it unlawful for the defendant to furnish him transportation on any train except upon receiving from him the regular fare in money for such transportation.",

which was denied, and the learned Trial Justice directed a verdict in favor of the defendant in error (Record, pp. 20-22). Plaintiff in error appealed to the Appellate Term of the Supreme Court from the judgment entered upon said verdict (Record, p. 2), which affirmed the judgment without opinion (Record, p. 28). An appeal was thereafter taken to the Appellate Division of the Supreme Court which affirmed the order and determination of the Appellate Term (Record, pp.

31-32). An application was thereafter made to the Appellate Division for leave to appeal to the Court of Appeals, which was denied (Record, p. 34). Under Sections 190-191 of the Code of Civil Procedure of the State of New York, no appeal can be taken to the Court of Appeals in an action commenced in the City Court of the City of New York unless the Appellate Division of the Supreme Court allows such appeal. The sections referred to read as follows:

"Sec. 190. (Am'd 1895). The Jurisdiction of the Court of Appeals in civil actions.

The court of appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, 1895, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December, 1895, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for re-

view the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

Sec. 191. (Am'd, 1895, 1896, 1898, 1900). Limitations, exceptions and conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceedings commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals."

Thereafter an order allowing a writ of error to this Court was granted by the Presiding Justice of the Appellate Division of the Supreme Court (Record, p. 35).

Specification of Errors Relied on.

The errors relied on are as follows (Record, pp. 38-39):

"1: The Appellate Division of the Supreme Court of the State of New York for the First Judicial Department erred in affirming the determination and order of the Appellate Term of the said Supreme Court and the judgment of the City Court of the City of New York, entered upon such order and determination.

2: The said Appellate Division erred in not reversing the said determination and order of the Appellate Term of the Supreme Court and the judgment of the City Court of the City of New York, entered upon such order and determination.

3: The said Appellate Division erred in failing to hold that the agreement entered into between the plaintiff and the defendant in the year 1901 purported to obligate the defendant to transport the plaintiff or to furnish him with tickets or passes entitling him to be transported by the defendant on its railroad within the State of New York, as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state, and was, therefore, subject to the provisions of the Act of Congress approved February 4, 1887, known as the Act to Regulate Commerce, and the acts amendatory thereof and supplemental thereto and in particular the act of Congress approved June 29, 1906.

4: The said Appellate Division erred in holding that on and after August 28th, 1906, it was not unlawful and violative of the said acts of Congress for the defendant to transport the plaintiff or to furnish him with tickets or passes entitling him to be transported by the defendant on its railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state unless defendant received money in payment therefor.

5: The said Appellate Division erred in holding that the defendant did not rightfully refuse to transport plaintiff or to furnish the plaintiff with tickets or passes entitling him to be transported on defendant's railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state

as demanded by the plaintiff, in September, 1906, in part payment of the map furnished by him to the defendant.

6: The said Appellate Division erred in holding that the refusal of the defendant to transport plaintiff or to furnish him with tickets or passes entitling him to be transported by the defendant on its railroad as part of one or more continuous journeys beginning at a point in one state and terminating at a point in another state, as demanded by plaintiff in September, 1906, was a breach on the part of the defendant of the terms of the agreement mentioned in the complaint.

7: The said Appellate Division erred in holding that the enactment and the going into effect of the act of Congress, hereinbefore mentioned, approved June 29, 1906, did not operate as a cancellation of the said contract between the parties to the above entitled action.

8. The said Appellate Division erred in holding that the enactment and the going into effect of the act of Congress, hereinbefore mentioned, approved June 29, 1906, did not exonerate, excuse and release the defendant from any continued, further or additional liability to the plaintiff under or in respect of the said contract between the parties to the above-entitled action.

9: By reason and in view of the enactment and going into effect of the Act of Congress, approved June 29, 1906, hereinbefore mentioned, the said Appellate Division erred in holding that in this action the plaintiff herein was entitled to recover any damages of and from the defendant for an alleged breach of contract."

BRIEF OF THE ARGUMENT.

1. The transportation which plaintiff in error agreed to furnish defendant in error was to be used on interstate journeys and was, therefore, subject to the provisions of the Act of February 4, 1887, and the amendments thereof and supplements thereto, known as the Interstate Commerce Act. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young,* 219 U. S. 498; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111. *Louisiana R. R. Commission* v. *Texas & Pacific Ry. Co.* 229 U. S. 336.

2. On and after August 28, 1906, the date upon which the amendment to the Interstate Commerce Act of June 29, 1906, became effective, it was unlawful for the plaintiff in error to furnish defendant in error transportation for use on an interstate journey, except upon receiving from him in money the regular fare provided in its tariffs in payment for such transportation. *Louisville & Nashville Railroad Company* v. *Mottley,* 219 U. S. 467; *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States,* 219 *U. S.* 486.

3: The refusal of plaintiff in error to furnish defendant in error transportation in September, 1906 to apply in part payment of the map in question, did not constitute a breach of the agreement on its part and no cause of action arose in favor of defendant in error because of such refusal.

FIRST POINT.

The transportation which plaintiff in error agreed to furnish was to be used on interstate journeys and was, therefore, subject to the provisions of the Interstate Commerce Act. (34 Stat. 584.)

The theory upon which the verdict was directed for the defendant in error was that plaintiff in error operated trains between points entirely within the State of New York, and that in September, 1906, there was no statute in effect in New York which prohibited a common carrier from giving free transportation to intrastate passengers and, therefore, the plaintiff in error should have complied with the request of defendant in error made in September, 1906, for transportation from New York to Buffalo (Record, pp. 20-22).

The testimony clearly shows that the transportation which plaintiff in error agreed to furnish in payment of this map was to be used by defendant in error between New York City and his farm at Gerard, Pa., and the demand which he made in September, 1906, was for transportation which he intended to use between those points (Record, pp. 11, 13-14, 16). Inasmuch as defendant in error was destined from a point in the State of New York to a point in the State of Pennsylvania, the commerce was interstate in character and the provisions of the act could not have been evaded by making an arrangement with defendant in error to travel on an interstate train from New York to Buffalo and furnish him transportation to be used on such train.

This Court has held in a number of cases that where property intended for export is shipped from a point in one state to another point in that state on local bills of lading, the property from the time of its delivery

to the carrier at original shipping point is in interstate or foreign commerce and the character of the commerce is not changed by the fact that separate bills of lading are issued for the intrastate transportation.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, it is held that goods actually destined for export are in interstate, as well as foreign, commerce when they actually start in the course of transportation to another state or are delivered to a carrier for transportation, whether shipped on through bills of lading or on an initial bill of lading to a terminal within the State, where they are delivered to another carrier for the foreign destination.

In *Texas and New Orleans R. R. Co.* v. *Sabine Tram Company*, 227 U. S. 111, it was held by this Court that shipments of lumber on local bills of lading from one point in a State to another point in the same State destined from the beginning for export, were foreign and not intrastate commerce. That merchandise destined for export acquires the character of foreign commerce as soon as actually started for destination or delivered to a carrier for transportation; that it is the nature of the traffic and not its accidents which determines whether it is intrastate or foreign commerce.

In *Louisiana Railroad Commission* v. *Texas and Pacific Railway Company*, 229 U. S. 336, Mr. Justice McKenna, writing for the Court, says (pp. 340-343):

> "The sole question in the case is whether the shipments were foreign or intrastate commerce, or, speaking more accurately, whether they were within Federal or State jurisdiction. The Circuit Court and the Circuit Court of Appeals both decided, as we have seen, that they were within Federal jurisdiction.
>
> "Appellants attack the conclusion and rely on, as the master relied on, the case of *Gulf, Colorado*

& Santa Fe R. R. Co. v. *Texas, supra.* The argument is that the service rendered by the railroad companies was wholly within the State and had 'no contractual or necessary relation to foreign transportation.' It was, it is argued, 'manifestly preliminary thereto, independently contracted for, and not necessarily connected therewith.' And the principle is urged that 'locality, therefore, determines the jurisdiction (separation between Federal power and state power) unless it is shown that though the local movement is actually within, it is legally outside the State.' To make the movement within legally outside of the State, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it is contended that 'not a single fact appears or exists, physical or other which connects the railroads with the ocean carrier' and that the intention of the shippers or consignees is made absolutely controlling.

"To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101; and *Texas & New Orleans R. R. Co.* v. *Tram Co.,* 227 U. S. 111.

"In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And

it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans."

This principle applies to the transportation of passengers as well as to the transportation of freight.

Louisville and Nashville R. R. Co. v. *Maxwell* 237 U. S. 94.

It was the intention of the defendant in error, as appears from the testimony, to use the transportation on an interstate journey and, therefore, the provisions of the interstate commerce act clearly applied to the issuance of the transportation.

SECOND POINT.

On and after August 28, 1906, the date when the Act of Congress of June 29, 1906, 34 Stat. 584, became effective, it was unlawful for plaintiff in error to furnish transportation for use upon an interstate train, or for part of an interstate journey, except upon receiving in money the rate provided in its filed tariffs for such transportation.

The case of *Louisville and Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, is, we submit, controlling in the instant case. The facts in that case are that as the result of a collision in Kentucky, of railroad trains belonging to the Louisville and Nashville R. R. Co., the plaintiffs Mottley and wife received serious personal injuries, and after the collision the plaintiffs and the company entered into a written agreement which pro-

vided that in consideration of the release by the plaintiffs of all claims for damages for the injuries received by them in said collision, the railroad company agreed to issue free passes on its railroad and branches to said Mottleys annually during the lives of said Mottley and wife or either of them. The railroad company adhered to the agreement for many years but refused further to perform it, on the ground that the Act of Congress of June 29, 1906 made its enforcement illegal, and the relief sought in that action was that the defendant company be required specifically to execute the above agreement by issuing passes to the plaintiffs for the year 1909 and for every year thereafter so long as the plaintiffs should each live, over all the railroads of the Louisville and Nashville Company. It was held that the effect of the amendment of June 29, 1906 to the Interstate Commerce Act was to prohibit a common carrier from accepting anything except money in payment of transportation furnished by it; that the power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but that such contracts are made subject to the possibility that even if valid when made Congress may by exercising its power render them invalid; that the act in question was not invalid as taking private property without compensation because it invalidates contracts between individuals which conflict with the public policy declared in the act; that after the enactment of the act of June 29, 1906, it was unlawful for a carrier to issue interstate transportation in pursuance of a prior existing contract to do so as compensation for injuries received, and that such contract even though valid when made could not be enforced against the carrier by suit. Mr. Justice Harlan, delivering the opinion of the court, says (pp. 475-477):

"The act of February 4, 1887, regulating com-

merce declared it to be an unjust and unlawful discrimination for any carrier subject to the provisions of that act, directly or indirectly, by any special rate, rebate, drawback or other device, to charge, demand, collect or receive from any person or persons 'a greater or less compensation' for any service rendered or to be rendered in the transportation of passengers or property than was charged, demanded, collected or received from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. 24 Stat. 379, c. 104, Sec. 2. But the act of June 29, 1906, made a material addition to the words of the act of 1887; for, it expressly prohibited any carrier, unless otherwise provided, to demand, collect or receive 'a greater or less *or different* compensation' for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. *Market* v. *Hoffman*, 101 U. S. 112, 115. The history of the acts relating to commerce shows that Congress, when introducing into the act of 1906 the word 'different,' had in mind the purpose of curing a defect in the law and of suppressing evil practices under it by prohibiting the carrier from charging or receiving compensation except as indicated *in its published tariff*. 11th Ann. Rep. Interstate Com. Com., 141; 19th Ib. 78, 15; 40 Cong. Rec. Pt. 7,

p. 6608; Ib. 6617; Ib. 7428, 7434; Rept. of Confer. Com., 40 Cong. Rec. 9522; 42 Cong. Rec. Pt. 2, p. 1746.

"In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.

"That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being

the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co.* v. *Goodridge,* 149 U. S. 690, 691; *Gulf, Col. Etc. Ry. Co.* v. *Hefley,* 158 U. S. 98, 102; *I. C. C.* v. *Ches. & Ohio Ry. Co.* 200 U. S. 361, 391; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 439. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs."

And at pages 485-486:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not

sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived.

In our opinion, the relief asked by the plaintiff must, upon principle and authority, be denied; that the railroad company rightly refused, after the passage of the commerce act, further to comply with the agreement of 1871; and, that the decree requiring performance of its provisions, by issuing annual passes, was erroneous."

Chicago, Indianapolis & Louisville Ry. Co. v. *United States*, 219 U. S. 486, was an action brought by the Government against a railroad company for a violation of the provisions of the Interstate Commerce Act in furnishing transportation to the publisher of Munsey's Magazine pursuant to an agreement made between Frank A. Munsey, Manager, and the Railroad Company. It was held that a common carrier subject to the provisions of the Interstate Commerce Act cannot accept any compensation other than cash for interstate transportation; that the delivery of such transportation in exchange for advertising is a violation of the Act, and it is no defense to the carrier that such transportation is permitted by a State statute. In its opinion in this case, the court says, page 496:

"1. The decisive question in this case is whether the contract between the Railroad Company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the Company, in return for the transportation which it agreed to furnish and did

furnish to the Munsey publisher over its interstate lines, and to his employes and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of *Louisville & Nashville R. R. Co.* v. *Mottley, ante,* p. 467, just decided, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the Railway Company of advertising, not of money in payment of the interstate transportation furnished to the publisher of the Munsey magazine, his employes and the immediate members of his and their families, was for the reasons given in the *Mottley* case, in violation of the commerce act. The facts in the present case show how easily, under any other rule, the act can be evaded and the object of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money.

2. We need say but little about the Indiana statute upon which the defense is in part based. The transactions, in respect of which the Government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No state enactment can be of any avail when the subject of such transactions has

been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an 'act of the legislature of a State prescribed a regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment.' *Sinnot* v. *Davenport*, 22 How. 227, 243; *M., K. & T. Railway* v. *Haber*, 169 U. S. 613, 686; *Reid* v. *Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, as well from the nature of the Government as from the words of the Constitution."

The same principle was followed by the Supreme Court of Washington in *Cowley* v. *N. P. R. R. Co.*, 68 Wash. 528, 41 L. R. A. (N. S.) 559, 123 Pacific 998. That was an action brought by plaintiff for a recission of a contract and a reconveyance of real property conveyed by plaintiff and his wife to the Railroad Company in consideration of which the defendant agreed to issue and deliver annual passes to the plaintiff and his wife during their natural lives, and to issue annual passes to their children for five years. The defendant performed its agreement until the amendment to the Interstate Commerce Act of 1906 took effect, after which time it refused to further perform the contract. It was held that the refusal of the Railroad Company to further perform the agreement gave no cause of action in favor of the plaintiff because the full performance of the contract was not arrested by any act or omission of the defendant, but by the Congress of the United States acting within its constitutional powers.

The defendant in error, when entering into the agreement with the plaintiff in error, is conclusively presumed to have known that such agreement was sub-

ject to termination at any time by an act of Congress. He had actual knowledge of the fact that the person with whom he was contracting had no authority to pay for this map in money, and knowing that fact he consented to accept payment for it in said transportation. This was in 1901. Between that time and September 1, 1906, the plaintiff in error furnished him all the transportation he demanded and which amounted in value to $730.25, sufficient, if applied against this map, to more than pay for it. During those five years, when the defendant could lawfully have furnished transportation, he applied substantially all the transportation he received in payment of other maps, and it is through no fault of the defendant that he did not receive all the transportation to which he was entitled on account of this map. The Plaintiff in Error could not have complied with his demands of September 24, 1906, and May 11, 1911, without violating the law and incurring the penalties therein prescribed.

THIRD POINT.

The refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, to apply in part payment of the map in question, did not constitute a breach of the agreement on its part and no cause of action arose in favor of defendant in error because of such refusal.

We have endeavored to show under the preceding points that the transportation which plaintiff in error refused to furnish on account of this map was for use on an interstate journey and that the amendments to the Interstate Commerce Act in effect at the time such transportation was demanded made the agree-

ment to furnish such transportation void and to have furnished same would have constituted a violation of the provisions of the statute. That being so, it follows that the refusal to furnish the transportation was justified and there was no breach of the agreement on the part of plaintiff in error and no cause of action accrued to defendant in error because of such refusal.

FOR THE FOREGOING REASONS, THE JUDGMENT SHOULD BE REVERSED.

Dated, N. Y., November 3, 1915.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 147.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

against

CHARLES P. GRAY,
Defendant in Error.

Reply Brief for Plaintiff in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Defendant in Error contends under the First Point of his brief, that no question is presented for this Court because plaintiff in error failed to establish not only the provisions of its tariffs but that it had in fact filed any tariffs.

Where filed tariffs are not included in the Record, this Court takes the findings of the State Court. *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94. The decision of the State court in the present case was based not upon the failure to file tariffs, but upon the ground that plaintiff in error should have furnished the transportation demanded by Gray in September, 1906 (Record, pp. 20-22).

In *Louisville and Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, Mr. Justice Harlan, delivering the opinion of this court, says, (p. 476):

> "In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce."

It does not appear from the opinion that the tariffs of the railroad company were before the court in that case. In any event, the ground of the decision is not that the acceptance of money in payment of transportation was prohibited by the tariffs, but that it was prohibited by the statute.

We submit that this Court will not indulge in the presumption that plaintiff in error was guilty of a misdemeanor in that it had failed to file tariffs as required by the act. Even if such tariffs had provided that payment might be made in advertising instead of money, such a provision would have been unlawful under the decision in the *Mottley* case.

Under his Second Point, defendant in error argues that a recovery should be permitted in this action because it is not brought to recover damages for breach of contract nor to enforce specific performance, but is brought in assumpsit to recover on a promise implied by law that a man shall pay for property furnished at his request.

This claim of counsel is evidently an afterthought. The record shows beyond dispute that the action was brought to recover money damages because of an alleged breach of the agreement by plaintiff in error in failing and refusing to furnish transportation demanded by defendant in error in September, 1906 and May, 1911, and verdict was directed against plaintiff

in error by the learned Trial Justice upon the ground that its refusal to furnish the transportation demanded in September, 1906 was a breach of the agreement. (Record, pp. 20-22.)

On page 11 of his brief, under this Point, it is stated that defendant in error had wholly performed his part of the contract prior to September, 1906.

Gray had not fully performed all the conditions on his part prior to the time the statute became effective. It was a part of the agreement that he was to demand and use transportation in payment of the map. The prohibitions of the act applied to both parties and prohibited Gray from demanding, receiving and using transportation in payment of the map and prevented the railroad company from issuing such transportation when demanded.

> "The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs." *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 467 at p. 477.

The following cases cited by defendant in error are distinguishable from the case at bar:

Jones v. *Judd*, 4 N. Y. 412, involved only the liability of the defendant for work performed prior to the date when further performance was stopped by the act of the Legislature. No claim was made that defendant was liable for breach of contract in not permitting plaintiff to fully perform the agreement. That case does however support the contention of the plaintiff

in error herein that a party to an agreement is not guilty of a breach thereof when further performance is prevented by the State.

Louisville & Nashville R. R. Co., v. *Crowe*, 156 Ky. 27, was an action in equity for specific performance of the agreement, or for damages if that could not be had. This action is one at law to recover for breach of contract. Another distinguishing feature between the *Crowe* case and the present one is that the contract involved herein might have been completely performed prior to the enactment of the amendment to the Interstate Commerce Act in September, 1906 if Gray had demanded the transportation within a reasonable time after the agreement was made, while in the *Crowe* case, the agreement was to run during Crowe's life.

Day v. *N. Y. C. & H. R. R. Co.*, 51 N. Y. 583, merely holds that a person who has paid money or performed services under an agreement contrary to the statute of frauds, may recover the money paid or the value of the services performed upon an implied agreement to pay, provided "he can show that he has been ready and "willing to perform the agreement and the other party "has repudiated or refused to perform it." That decision does not apply to a case where both parties to a contract have fully performed it in good faith and until further performance by both parties is prevented by the Legislature.

The cases holding that under personal contracts for employment, the employe may recover for services performed prior to the termination of the contract by the death of the employer, are not in point.

Irwin v. *Curie*, 171 N. Y., 409; *Tracy* v. *Talmage*, 14 N. Y., 162, and *Akers* v. *Mutual Life Insurance Co.*, 59 Misc. (N. Y.), 273, are not in point, because in each of those cases it was held that but one of the parties was prohibited from performing his part of the agreement.

Here the prohibitions of the Statute applied to both parties to the agreement.

A New York case analogous in principle to the present one is that of *People* v. *Globe Mutual L. Ins. Co.*, 91 N. Y. 174. In that case the defendant Company had contracted with James C. Mix for his employment for a term of five years following December, 1876, at a specified annual salary. In May, 1879, the State prevented further carrying on of business of the Company because its reserve had fallen below the lawfully required level. In liquidation of the affairs of the Company, Mix claimed damages by reason of the termination of his employment short of the contract term.

FINCK, *J.*, writing for the court, at page 178, *et seq.*, says:

> "There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to per-

form on his part. (*Shaw* v. *Republic Life Ins. Co.*, 69 N. Y. 292, 293; *James* v. *Burchell*, 82 id. 113.) He could do neither. Performance by him, had become illegal. It would have been criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. (*Jones* v. *Knowles*, 30 Me. 402.) So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation."

Under the Third Point of his brief, the defendant in error attempts to distinguish the present case from the *Mottley* case, on the ground that the latter case was one brought in equity to require specific performance of the contract and because this Court refused to determine whether or not without enforcing the contract the Mottleys might in some other form of proceeding recover the rights they had when the collision in which they were injured, occurred, because that question was not before it. But in the *Mottley* case, this Court said, (p. 483):

"After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be en-

forced in any court. The rule upon this subject is thoroughly established."

And at p. 485:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, *it cannot now be enforced against the railroad company, even though valid when made.*"

(Italics ours.)

While it is true that this action is not brought to enforce specific performance of the agreement, it is nevertheless brought to enforce the agreement and because of an alleged breach of the agreement on the part of the plaintiff in error. An action need not necessarily be brought in specific performance to enforce an agreement. The defendant in error is attempting to do indirectly what this Court said could not be done directly. The decision in the *Mottley* case is, we submit, controlling in this case.

Defendant in error also claims that this case is distinguishable from the *Mottley* case, in that here the damages were liquidated, and in that case they were unliquidated. The pleadings and testimony show that Gray did not consider the amount as liquidated and the damages here were unliquidated until fixed by the Court.

The statement of defendant in error that the case of *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States*, 219 U. S. 486, merely holds that specific performance of an agreement to furnish transportation in payment of advertising cannot be enforced, is incorrect. In that case, the Court held that Congress intended that all who obtained transportation on inter-

state lines, with certain specified exceptions, should be on a plane of equality and should pay for their transportation in money and not in commodities or services or otherwise than in money. That action was brought against the railroad company to recover a penalty and was not one in equity to enforce specific performance.

Defendant in error argues under the Fourth Point of his brief that there is nothing inequitable in requiring plaintiff in error to pay money instead of transportation for the balance of the purchase price of the map. The fallacy of this argument lies in the fact that the railroad company refused to pay the balance in money when the agreement was made, indicating that it considered the payment in transportation as altogether different than pyament in money. The reason for such belief on the part of the railroad company is apparent because of the fact that the furnishing of transportation to the defendant in error involved no additional expense or cost on its part. Again if equitable principles are to be invoked, as the defendant in error contends, the suit should have been brought in equity for an accounting or other appropriate relief, and in such case the plaintiff in error would have been entitled to allege, and the facts would have sustained an allegation to the effect that the defendant in error was guilty of laches, in that he did not make demands for the transportation within a reasonable period of time.

The present case is distinguishable from that of *New York News Publishing Co.* v. *National Steamship Co.*, 148 N. Y., 39, cited under the Fifth Point of the brief of defendant in error, in that that decision did not involve the construction of any statute prohibiting performance of the contract by the Steamship Company.

Under the Sixth Point, defendant in error urges that he should have been furnished with the transportation

demanded between points within the State of New York because the demand was made prior to the enactment of the Public Service Commissions Law of the State of New York. If this contention is correct, then plaintiff in error may still issue transportation between points within New York State, in payment of advertising to interstate passengers because the Public Service Commissions Law applies only to the transportation of passengers and property destined between intrastate points. Such a construction of the statute would entirely defeat the purpose for which it was enacted.

The claim of defendant in error under Point Seven that if the statute be construed so as to result in a cancellation of the unpaid balance of the purchase price of the map, it is unconstitutional, in that it takes property without due process of law, was fully answered in the *Mottley* case, in the following language, (pp. 482-3):

> "These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.
>
> It is said that if Congress intended by the commerce act to embrace such a case as this, then the act is repugnant to the Constitution. Does the act infringe upon the constitutional liberty of the citizen to make contracts? Manifestly not. In the *Addyston Pipe* case (p. 228) above cited, the court

said: 'We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts,' relating to interstate commerce. Again: 'But it has never been, and in our opinion ought not to be held that the word (liberty) included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, *while in the exercise of its constitutional right to regulate commerce among the States.* * * * Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.'

Dated, New York, December 15, 1915.

Respectfully submitted,

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No. 147.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error.

against

CHARLES P. GRAY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILSON E. TIPPLE,
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Supreme Court of the United States,

OCTOBER TERM 1915.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

against

CHARLES P. GRAY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Charles P. Gray, the defendant in error, brought an action against the New York Central & Hudson River Railroad Company, the plaintiff in error, to recover the value of a certain map made and delivered by Gray to the Railroad Company, less the amounts paid by the Railroad Company on account.

The action is brought in assumpsit to recover upon the quasi-contract or promise implied by law, that a man shall pay for property furnished to him at his request. The action is not brought to recover damages for breach of contract or to enforce the specific performance of the contract.

The complaint alleges that in 1901, the plaintiff and the defendant entered into an agreement whereby the

plaintiff agreed to prepare and deliver to the defendant a map for which the defendant agreed to pay to the plaintiff $1000.00, of which amount $150.00 was to be paid upon delivery of the map and the balance of $850.00 was to be paid in transportation from time to time as the same might be demanded by the plaintiff; that the plaintiff thereafter and prior to August 1, 1901, prepared and furnished the map, and the defendant paid to the plaintiff $150.00 in money on account thereof; that on or about September 1st, 1906, plaintiff demanded certain transportation from the defendant due under said agreement, and that defendant declined and refused and still declines and refuses to furnish any transportation under said agreement or in any other way to compensate the plaintiff for the balance due to the plaintiff from the defendant (Record, p. 3). That the reasonable value of the map was $1000 (Record, p. 3).

The cause of action arises from the following facts, all of which were duly established upon the trial of this action:

In November, 1900, Gray and the Railroad Company entered into an agreement whereby Gray agreed to make and furnish to the Railroad Company a map for which the Railroad Company agreed to pay $750 (Record, p. 8). Of this amount, $150 was to be paid in money and $600 in transportation over the Railroad Company's lines (Record, p. 8). Gray prepared and delivered the map in the year 1901 and the Railroad Company duly paid to him the $150 payable in money (Record, p. 10). Of the $600 payable in transportation, Gray demanded and received prior to 1906, $55.77 leaving a balance of $544.23 which has never been paid (Record, p. 12).

This transportation which the Railroad Company agreed to furnish under its agreement was transportation over its own lines only (Record, pp. 8, 15).

Gray testified that he intended to use this transporta-

tion on trips which he made from New York City to Girard, Pennsylvania via Buffalo, New York (Record, p. 14).

The Railroad Company operated no lines beyond Buffalo (Record, p. 15) and its lines from New York City to Buffalo were wholly within the State of New York (Record, p. 15).

The amended Interstate Commerce Act became effective August 28, 1906.

The particular portion of the amended Act, upon which the plaintiff in error relies as showing the illegality of the contract is the seventh paragraph of section 6 of the amended Interstate Commerce Act and reads as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'"

In September, 1906, Gray demanded "transportation

from New York to Buffalo and return" (Record, pp. 9, 22, 23) which he testified he intended to use on a trip to Girard, Pennsylvania.

The Railroad Company declined to furnish this transportation upon the ground that the amended Interstate Commerce Act prohibited the Railroad Company from furnishing any further transportation under the agreement (Record, pp. 9, 23, 24).

On July 1st, 1907, the Public Service Commissions Law of the State of New York became a law. The first paragraph of Section 33 thereof reads as follows:

> "1. No common carrier subject to the provision of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

On May 19, 1911, Gray sent to the Railroad Company a bill for $850 for "services rendered: Balance due for

work on Map for Buffalo City Office January 1st, 1906, and agreed to be paid in transportation over New York Central R. R." (Record, p. 14,, Plaintiff's Exhibit 4, Record, p. 24), and at the same time a letter requesting three tickets (Record, p. 11, Defendant's Exhibit A, Record, p. 24), which were not furnished.

The map is still in the possession of the Railroad Company and its reasonable value when delivered was $1000 (Record, p. 9). The map was made to the special order of the Railroad Company for use at its Buffalo office during the Pan-American Exposition of 1901 (Record, pp. 7, 8).

The trial court awarded judgment in favor of the defendant in error for $544.23 and interest (Record, p. 22). This amount is computed by deducting from the agreed price of the map $750 the money payment of $150, and the value of the transportation furnished $55.77 (Record, p. 22).

The judgment was affirmed in turn by the Appellate Term and the Appellate Division of the New York Supreme Court (Record, pp. 28, 31).

Brief of the Argument.

1. The record in this case presents no question for the decision of this Court because the sole basis of the error claimed by the plaintiff in error is that the amended Interstate Commerce Act made it unlawful for the plaintiff in error to furnish the transportation demanded in September, 1906. But the Interstate Commerce Act did not in terms invalidate the contract, but only prohibited the plaintiff in error from accepting a different compensation from that specified in its tariffs and there is no evidence that any tariffs had been filed by the plaintiff in error or of the terms of the tariffs, if any were on file. (Page 8.)

2. Admitting for argument (1) that the transportation which plaintiff in error agreed to furnish was to be used on interstate journeys, (2) that after August 28, 1906, it was unlawful for the plaintiff in error to furnish further transportation under its agreement and (3) that the refusal of plaintiff in error to furnish defendant in error transportation in September 1906 was for that reason right and proper, nevertheless the defendant in error is entitled to recover the value of the map furnished by him pursuant to the agreement, less the various amounts received by him in part payment. The action is not brought to recover damages for breach of contract or to enforce specific performance of the contract. *Louisville & Nashville R. R. Co.* v. *Crowe*, 156 Ky., 27; *Jones* v. *Judd*, 4 N. Y., 411; *Day* v. *N. Y. C. R. R. Co.*, 51 N. Y., 583; *Tracy* v. *Talmage*, 14 N. Y., 162; *Irwin* v. *Curie*, 171 N. Y., 409; *Ackers* v. *Mutual Life Ins. Co.*, 59 Misc. (N. Y.) 273. (Page 10.)

3. The cases relied upon by the plaintiff in error *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S.

467, and *Chicago etc. R. R. Co.* v. *United States,* 219 U. S. 486, are distinguishable from the present case because they merely hold that specific performance cannot be had of such a contract and do not decide the question here involved. (Page 18.)

4. There is nothing inequitable in requiring the plaintiff in error to pay money rather than transportation for the balance of the purchase price of the map. (Page 20.)

5. The legal result of the failure of the plaintiff in error to furnish the transportation when demanded was to convert the claim from one for transportation into one for money. *New York News Publishing Co.* v. *National S. S. Co.,* 148 N. Y., 39. (Page 21.)

6. The refusal of the plaintiff in error in September 1906 to furnish any transportation was improper because the amended Act did not invalidate the contract or prohibit the plaintiff in error from furnishing intrastate transportation which was all that the contract required. (Page 22.)

7. If the Interstate Commerce Act as contended by the plaintiff in error cancels the unpaid balance of the purchase price of the map, then the act is unconstitutional as a taking away of property without due process of law contrary to the Fifth Amendment of the Constitution. (Page 25.)

FIRST POINT.

The record in this case presents no question for the decision of this Court because the sole basis of the error claimed by the plaintiff in error is that the amended Interstate Commerce Act made it unlawful for the plaintiff in error to furnish the transportation demanded in September, 1906. But the Interstate Commerce Act did not in terms invalidate the contract, but only prohibited the plaintiff in error from accepting a different compensation from that specified in its tariffs and there is no evidence that any tariffs had been filed by the plaintiff in error or of the terms of the tariffs, if any were on file.

The nine errors assigned in the specification of errors are all based upon the fundamental contention that the amended Act made it unlawful in September 1906 for the Railroad Company to furnish the transportation then demanded by Gray. It is obvious that unless the Railroad Company has established that proposition, no question is presented for the decision of this Court.

The transportation demanded by Gray was not in any sense *free* transportation so that the only basis for the claimed prohibition is that part of section 6 of the amended Interstate Commerce Act which forbids a railroad company from accepting *a different compensation from that provided in the tariff*.

But the plaintiff in error failed to establish not only the provisions of its tariffs, if any, but also that it had in

fact filed any tariffs and there is nothing contained in the record by which we can determine the standard required to make the prohibition of the amended Act operative.

Inasmuch as the prohibition of the amended Act does not operate, it cannot be contended that it justified the plaintiff in error's refusal to furnish the transportation demanded in September 1906 and therefore there is no question presented for the decision of this Court.

SECOND POINT.

Admitting for argument (1) that the transportation which plaintiff in error agreed to furnish was to be used on interstate journeys, (2) that after August 28, 1906, it was unlawful for the plaintiff in error to furnish further transportation under its agreement and (3) that the refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, was for that reason right and proper, nevertheless the defendant in error is entitled to recover the value of the map furnished by him pursuant to the agreement, less the various amounts received by him in part payment. The action is not brought to recover damages for breach of contract or to enforce the specific performance of the contract.

The plaintiff in error relies (Record, p. 20) upon the seventh paragraph of Section 6 of the Interstate Commerce Act as amended in 1906 which expressly prohibits a carrier from collecting or receiving "a greater or less or *different* compensation" for the transportation of persons than that specified in the filed tariff.

In the case of Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., 467, this Court held that this provision of the amended Act prohibited a railroad from receiving anything in payment of a passenger's fare except what the tariff provided, in that case, money, and that the effect of this amendment was to render further perform-

ance by a railroad of a contract to furnish transportation, in satisfaction of claims for damages, illegal and impossible of performance, although the contract had been made prior to the passage of the amended Act.

We shall discuss hereafter the question of the applicability of the Act to this present contract, and while the plaintiff in error did not establish that this contract was void and illegal under the terms of the amended Act, we shall under this point concede for the purpose of argument the entire basis of the case of the plaintiff in error, i. e., that the refusal by the Railroad Company was proper and that no further transportation could lawfully be furnished by the Railroad Company after August 28, 1906, the date upon which the amended Act became effective.

So far as further performance by the Railroad Company was concerned the contract then became void and unenforcible, but these facts remain, (1) that Gray had prior thereto wholly, performed his part of the contract, (2) that the Railroad Company had the map (3) that Gray has never received $544.23 of the purchase price of the map.

The agreement between Gray and the Railroad Company was entered into in November 1900 and it is beyond dispute that the agreement was then and until August 28, 1906, a valid and lawful agreement.

Gray delivered the map to the Railroad Company in the year 1901 and thus fully performed his entire part of the contract while the agreement was beyond dispute still a valid and lawful agreement.

The decisions are entirely clear that one who has wholly performed his part of a contract valid when made and valid when performed by him may recover from the other party in assumpsit the value of the property furnished and the services performed notwithstanding the fact that the contract itself as a contract had be-

come unenforcible and incapable of further performance by the other party, by reason of the contract being or becoming illegal or void. In such a case the contract though void is referred to for the purpose of ascertaining the agreed value of the property or services in computing the amount of the recovery permitted.

In the case of *Jones* vs. *Judd,* 4 N. Y. 411, the defendant Judd contracted with the State of New York to complete certain portions of the Genesee Valley Canal and sublet a portion of the contract to the plaintiffs. After the plaintiffs had done some work under their sub-contract, a law was passed which put an end to the original contract and to the sub-contract between the plaintiffs and the defendant. The Court held that the plaintiffs were entitled to recover from the defendant the value of the work actually performed by them at the price agreed upon by the sub-contract. The court said:

> "As the plaintiffs were prevented by the authority of the state from completing their contract, they are entitled to recover for the work performed at the contract price."

In the case of *Louisville & Nashville R. R. Co.* vs. *Crowe*, 156 Ky., 27, one Crowe had conveyed in 1898 to the Railroad Company a strip of land for a right of way in consideration of the railroad company furnishing to him during his life an annual pass good between Scottsville, Kentucky and Gallatin, Tennessee. The railroad company duly furnished the passes up to and until 1911 and then refused to issue further passes, because of the amended Interstate Commerce Act and the decision of this Court in *L. & N. R. R. Co.* v. *Mottley,* 219 U. S., 467, decided February, 1911. The Kentucky Court of Appeals affirmed a judgment in Crowe's favor for the value of the right of way, less the value of the transportation which he had received

The Court said:

"Appellant cites a number of authorities holding that to the general rule that a party to a contract is not discharged by subsequent impossibility of performance, there is the exception that, where the performance becomes impossible by law, either by reason of a change in the law, or by some action by or under the authority of government, the promisor is excused. But these authorities merely hold that it is a general rule of law that where a contract is lawful when made, and a subsequent enactment renders performance of it unlawful, neither party shall be prejudiced, and the contract is at an end. They do not hold that one party can take the property of another under a promise to pay for it, and still hold it, and not pay for it, if, by reason of an enactment of law, after the contract is made, such party is prohibited from making payment in the article he contracted to pay with. And if those cases did so hold, we would be inclined to disagree with them. The party obtaining the property in this way should be required to restore it, or to pay for it upon equitable terms.

"Here, appellee in good faith conveyed and delivered up the possession of his land in consideration of the promise of his vendee to pay for same in a particular thing, an annual pass. This was in effect a contract to pay appellee the purchase price of his land in annual installments during the remainder of his life, instead of in one lump sum at the time of the execution of the deed, and, to pay said purchase price of his land in transportation over the said line of railroad, rather than in cash, or other medium of exchange. This consideration has not been fully paid. The medium of payment in said

deed provided for and agreed upon is no longer of permissable use, by reason of the act of Congress above mentioned as construed by the Supreme Court of the United States in the Mottley case; but, rather than do the appellee the injustice of declaring a forfeiture of the unfulfilled contract by a release and discharge of appellant from all liability thereunder, some other medium of payment should in good conscience be substituted for the medium which is no longer available; or appellee should recover or be restored to the rights he had when the said deed was executed by him.

"In this case, it would not be equitable to restore to appellee the land taken and retained; nor could this now be done, the rights of the public having intervened. The equitable way to adjust the matter is to require appellant to pay to appellee a reasonable sum, based, not on the probable value of what he would have received thereunder for the remainder of his life, or upon the breach of the contract, but for the right of way so taken and necessarily retained, taking into consideration, of course, what appellee has already received under the contract.

"From the evidence in this case, we think the lower court did this, and the judgment is therefore affirmed."

The facts involved and the relief given in the case last quoted are in principle the same as those in the present case and the reasons given for that decision apply with equal force to the present case. The map here involved was made to the special order of the Railroad Company and primarily for a particular use long since performed i. e. for use at its Buffalo office during the Exposition of 1901. It is obvious that such a map has no market value

and in fact no real value to any one except the Railroad Company for whom it was made.

To have decreed a re-delivery of this map to Gray as a complete satisfaction of his claim would have been in this case as inequitable to Gray because of its insufficiency as would have been in the case last cited, the reconveyance of the land because of its great increase in value.

Cases involving the statute of frauds furnish other examples of the relief granted though the contract be void.

Thus a defendant refusing to perform a contract void under the statute of frauds, after he has received the benefit of plaintiff's performance of the contract will be required to compensate the plaintiff for the benefits conferred. While the action cannot in such a case be maintained upon the void contract itself, the plaintiff is nevertheless permitted to maintain his action in quasi-contract to recover the value of services rendered and material furnished under the contract.

In the case of *Day* vs. *N. Y. C. R. R. Co.*, 51 N. Y., 583, the plaintiff conveyed to the defendant a parcel of land in consideration of the payment by the defendant of $1 and an agreement on the part of the defendant to give to the plaintiff the business of caring for the live-stock which should be transported upon the defendant's railroad. After the agreement had run for a year, the defendant claimed that the agreement was void, under the statute of frauds. The court held that the agreement was void, *but that the plaintiff was entitled to recover the value of the land, less the profits which he had made during the year* in caring for the live stock.

The Court said:

> "If one pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid in an action for money had and received, and he may re-

cover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. Gillet v. Maynard, 5 Johns 85; King v. Brown, 2 Hill 439; Cook v. Doggett, 2, Allen 439; Erben v. Lorillard, 19 N. Y., 299; Richards v. Allen, 17 Me., 296."

Still another example is the relief afforded upon the termination of any personal contract by impossibility of further performance, for example by the death of an employer. It is the settled rule that the other party is nevertheless entitled to recover for services rendered and material furnished prior to the termination of the contract and that the contract itself furnishes the measure of damages.

Cases involving contracts illegal when made furnish other examples of the relief given although the contract itself is void.

The rule is well settled that where the statutory prohibition which invalidates the contract is imposed upon only one party to the contract, the parties are not in pari delicto but that the party who is not included in the statutory prohibition is regarded as an innocent party and is permitted to recover in quasi-contract for benefits conferred by him under the illegal contract upon the other party.

Thus in the case of *Irwin* v. *Curie*, 171 N. Y., 409, an attorney and a custom-house broker agreed to divide the attorney's fee. The attorney alone was by Section 74 of the New York Code of Civil Procedure prohibited from entering into such an agreement. The broker was not covered by the prohibition. In an action brought by the broker against the attorney, it was held that as only the attorney was prohibited by the statute from entering

into the agreement and the act prohibited was mala prohibita and not malum in se, the parties were not in pari delicto and the broker was entitled to recover.

In the case of *Tracy* v. *Talmage*, 14 N. Y. 162, it was held that although a banking association could not be sued upon certificates issued ultra vires and contrary to an act prohibiting such issue and therefore void yet since the penalties of the act were imposed exclusively upon the corporation, the parties were not in pari delicto and the plaintiff could recover in quasi-contract for the value received by the defendant. The Court said:

> "Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality but upon an implied contract founded upon the moral obligation resting upon the defendant to account for the money or property received."

To the same effect is the case of *Akers* v. *Mutual Life Insurance Co.*, 59 Misc. (N. Y.), 273.

THIRD POINT.

The cases cited by the plaintiff in error are distinguishable from the present action.

In the case of *Louisville & Nashville R. R. Co.* vs. *Mottley*, 219 U. S. 467, the action was brought for specific performance, not for damages based on the right released and "the relief sought was that the defendant company be required specifically to execute the above agreement by issuing passes to the plaintiffs for the year 1909 and for each year thereafter so long as the plaintiffs shall each live over all its roads in and out of Kentucky." This Court denied the relief sought i. e. specific performance but said:

> "In our opinion the relief asked must upon principle and authority be denied * * *.
>
> "Whether without enforcing the contract in suit, the defendants in error may, by some other proceeding against the railroad company recover or restore the rights they had when the railroad collision occurred, is a question not before us and we express no opinion on it."

It should also be noted that the passes demanded in that case were in payment of an unliquidated claim for damages due to personal injury.

In the case of *Chicago, Indianapolis & Louisville R. R. Co.* vs. *United States*, 219 U. S., 486, the contract involved was made on January 24th, 1907, after the amended Act became effective. So far as that case has any bearing upon the present case, the decision merely shows that there cannot now be specific performance of such a contract.

In the case of *Cowley* vs. *Northern Pacific R. R. Co.*, 123 Pacific Rep. 998, the plaintiff had prior to 1906 conveyed a piece of land to the railroad company in consideration of life passes being issued to plaintiff himself, his wife and each of his children. The plaintiff's wife had died prior to 1906 so that the railroad company's contract had been in part completely performed. The real property had increased greatly in value. The plaintiff brought his action for a reconveyance of the property (not as in the present case for the value of the property when conveyed less the value of the transportation received). The Court held that reconveyance like specific performance was to be enforced only in the discretion of the court, and that as the real property had increased greatly in value and the contract had been substantially performed by the defendant, it would be unfair to order a reconveyance of the property as the defendant's failure to further perform was not due to the fault of the defendant.

Neither the facts of that case nor the relief sought make it in any way analogous to or decisive of the present case.

FOURTH POINT.

There is nothing inequitable in requiring the plaintiff in error to pay money rather than transportation for the balance of the purchase price of the map.

The plaintiff in error cannot properly complain because it must now pay the balance of the purchase price of the map in money, whereas except for the changed law it would have paid the same amount in transportation.

It should be noted that the value of the map was a liquidated amount and fixed primarily in money i. e. $750 and not an unliquidated claim fixed primarily in transportation, as for example if the Railroad Company had agreed to furnish a life pass in payment for a claim for personal injuries. As the agreement was to furnish this transportation for trips made by Gray and only as Gray might have occasion to use it and as he might demand it, it is obvious that by so furnishing the transportation, the plaintiff in error would on each occasion deprive itself of a cash payment of precisely the same amount.

FIFTH POINT.

The legal result of the failure of the plaintiff in error to furnish the transportation when demanded was to convert the claim from one for transportation into one for money.

Where a party agrees to pay a specific sum or the value of the services in some specific articles or property and upon demand refuses or fails to deliver the property his obligation is thereby converted into one for the payment of money.

Thus in the case of *New York News Publishing Co.* v. *National Steamship Co.*, 148 N. Y., 39, the plaintiff agreed to furnish advertising in exchange for steamship tickets to be furnished by the defendant. The plaintiff performed the work of advertising and received a part of the tickets. The plaintiff demanded the balance of the bill as tickets and on the refusal of the steamship company brought an action for the amount of the balance of the bill as money. The court held "that where a party agrees to pay a specific sum or as in this case the value of the services in specific articles of property and upon demand refuses or fails to deliver the property his obligation is thereby converted into one for the payment of money, 1 Sedgwick on Damages 8th Ed. sec. 280; Gleason v. Pinney, 5 Cow. 152; Smith v. Smith, 2 Johns. 235; Brooks v. Hubbard, 3 Conn. 58."

SIXTH POINT.

The refusal by the plaintiff in error in September, 1906, to furnish any transportation was improper because the amended Act did not invalidate the contract or prohibit the plaintiff in error from furnishing intrastate transportation which was all the contract required.

The transportation to be furnished by the Railroad Company was transportation between New York and Buffalo over its own lines and in itself wholly intrastate in character. It was as far as the contract is concerned, entirely immaterial to the Railroad Company what use Gray made of this transportation. The fact that Gray used or intended to use the transportation so furnished in part payment of his fare in trips from New York to Girard, Pennsylvania (a point beyond Buffalo and not on the Railroad's lines) was entirely immaterial to the Railroad Company *so far as the contract was concerned* and the particular use which Gray made or intended to make of this transportation did not go to the essence of the contract. So far as the contract was concerned the Railroad Company agreed to furnish transportation between New York and Buffalo and nothing else.

Conceding for argument that the amended Act included in its prohibition the furnishing by the Railroad Company of transportation between New York and Buffalo if it was to be used in interstate journeys, what the amended Act in fact did, was not to prohibit the *issuance* of the transportation, but the *acceptance* of the transportation for passage if used for interstate journeys.

Gray's original demand in September 1906 was oral

and it appears from his testimony that he intended to use this transportation in an interstate journey, but his subsequent written letter was a request for a general ruling on his contract and the Railroad Company in its reply declined without restriction to furnish any further transportation of any character under its contract.

This was improper because only the use of the transportation in *interstate* as distinguished from *intra*state journeys was prohibited by the amended act.

Section 1 of the Interstate Commerce Act expressly provides:

> "That the provisions of this act shall not apply to the transportation of passengers * * * wholly within one state."

Between August 28th, 1906, when the amended Interstate Commerce Act went into effect, and November 1st, 1907, the date upon which the prohibition contained in the New York Public Service Commission Law became effective, Gray unquestionably had the right to call for intrastate transportation and the Railroad Company was still legally able and bound to furnish intrastate transportation to him.

The plaintiff in error conceded upon the trial that it operated trains between New York and Buffalo which were engaged wholly in intrastate transportation (Record, p. 20) and was therefore able to furnish transportation exclusively intrastate in character.

The fact that Gray after receiving intrastate transportation might have sought to use it on an interstate journey is not a valid excuse for the Railroad Company's refusal to furnish it. As a practical solution of the matter, the transportation so issued might have had endorsed upon it a provision that it should be invalid on any other than a purely intrastate train and for an intra-

state journey. Such transportation would have been in September, 1906, a compliance with both the law and the contract.

It must however be expressly noted that after the New York Public Service Commission law became effective on November 1, 1907, no further transportation of any character could be furnished.

SEVENTH POINT.

If the Interstate Commerce Act, as contended by the plaintiff in error, cancels the unpaid balance of the purchase price of the map then the Act is unconstitutional as a taking away of property without due process of law contrary to the fifth amendment of the Constitution.

The argument of the plaintiff in error amounts to this: the Railroad Company agreed to pay the balance of the purchase price of the map, $544.23, in transportation, and the amended Act prohibits the payment of this amount in transportation, therefore Gray's claim for the balance of the purchase price of the map is cancelled notwithstanding the fact that the map is still retained by the Railroad Company.

If this be the true construction of the amended Act then the amended Act is unconstitutional because it then takes away property without due process of law.

Nor could such a taking away from Gray of all right of recovery be justified upon those broad grounds of public policy which justify the invalidation of the contract as such, because so far as Gray's compensation is concerned, the question is solely between Gray and the Railroad Company and to permit the recovery allowed by the New York Courts in the present case will in no way prejudice the rights of the public or constitute a rebate or discrimination nor will it any way prevent the accomplishment of the full remedial purpose of the amended Act.

For the foregoing reasons the judgment should be affirmed with costs.

All of which is respectfully submitted.

Dated, December 9th, 1915.

WILSON E. TIPPLE,
Attorney for Defendant in Error.

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Of Counsel.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY v. GRAY.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DISTRICT, STATE OF NEW YORK.

No. 147. Argued December 17, 1915.—Decided January 10, 1916.

The anti-pass provision in the Hepburn Act of 1906 applies to common carriers by railroad in interstate commerce with respect to transportation within the bounds of a State as part of an interstate journey.

While the anti-pass provision in the Hepburn Act of 1906 operates upon an agreement for exchange of transportation for anything else than money made prior to the passage of the Act so that specific performance can no longer be required, an interstate carrier cannot for this reason refuse to make just compensation in money for an unpaid balance for services fully performed under such a contract before the passage of the Act. *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 476, distinguished.

161 App. Div. 924, 932, affirmed.

THE facts, which involve the construction of the provisions of the Interstate Commerce Act as amended in 1906, prohibiting discrimination in regard to facilities and privileges of transportation and the validity of contracts made prior to the Hepburn Amendment and the rights of parties thereunder, are stated in the opinion.

Mr. William Mann, with whom *Mr. Charles C. Paulding* was on the brief, for plaintiff in error:

The transportation which plaintiff in error agreed to furnish defendant in error was to be used on interstate journeys and was, therefore, subject to the provisions of the Act of February 4, 1887, and the amendments thereof and supplements thereto, known as the Interstate Commerce Act. *Southern Pacific Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *Tex. & N. O. R. R.* v. *Sabine Tram Co.*, 227

U. S. 111; *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336.

On and after August 28, 1906, when the amendment to the Interstate Commerce Act of June 29, 1906, became effective, it was unlawful for the plaintiff in error to furnish defendant in error transportation for use on an interstate journey, except upon receiving from him in money the regular fare provided in its tariffs in payment for such transportation. *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467; *Chi., Ind. &c. Ry.* v. *United States*, 219 U. S. 486.

The refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, to apply in part payment of the map in question, did not constitute a breach of the agreement on its part and no cause of action arose in favor of defendant in error because of such refusal.

Mr. Arthur W. Clement, with whom *Mr. Wilson E. Tipple* was on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

In the month of November, 1900, Charles P. Gray, the defendant in error, made an agreement with the representatives of the New York Central & Hudson River Railroad Company, plaintiff in error, to make for the company a large map of the Vanderbilt Lines for the World's Fair, which was to take place at Buffalo in the following year. The price agreed to be paid him was $750, of which $150 was to be paid in cash and the balance in transportation to be used by defendant in error in traveling between New York City and his farm in Girard, Pa., following the lines of plaintiff in error between New York and Buffalo, and the line of another and independent railroad between that point and Girard. The map was made, delivered, and accepted, and the cash payment

of $150 was made. At different times between the making of the contract and the month of September, 1906, defendant in error received from plaintiff in error transportation to the value of $55.77 applicable to this contract. In September, 1906, he called upon the company for transportation for himself and wife from New York City to Buffalo and return, intending to use it for a visit to the farm at Girard, Pa. The demand was refused, upon the ground that because of the provisions of the Interstate Commerce Law the company could furnish no additional transportation on account of his services. A second demand of the same kind having been refused, defendant in error brought an action against plaintiff in error in the City Court of the City of New York for the unpaid balance of the agreed price of the map, to which plaintiff in error set up the defense that by the terms of the Hepburn Act of June 29, 1906, it was unlawful to furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The trial court, holding that this constituted no defense to the action, directed a verdict in favor of defendant in error for an amount made up by taking the agreed price of the map, deducting the cash payment and the amount paid in transportation, and adding interest to the balance. No particular question was or is made as to the *quantum* of recovery. The resulting judgment was affirmed by the Appellate Term of the Supreme Court, and its determination was affirmed by the Appellate Division of the Supreme Court for the First Judicial Department. 161 App. Div. 924, 932.

Leave to appeal to the Court of Appeals of the State was denied, and this writ of error was sued out.

Among the prohibitions contained in the Act of June 29, 1906, is the following (34 Stat. 587, c. 3591): "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation

of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." The reference, of course, is to common carriers by railroad in interstate commerce; and it is not questioned that plaintiff in error is within this category. The act took effect August 28, 1906 (34 Stat. 838, Res. 47).

In *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 476 *et seq.*, it was held that the prohibition we have quoted prevented the exchange of transportation for services, advertising, releases, property, or anything else than money, and that this operated upon an agreement made long before the passage of the act whereby the carrier, in consideration of a release of damages for injuries sustained by Mottley and his wife in consequence of a collision of trains upon the railroad, agreed to issue free passes to them, renewable annually during their several lives, the result being that after the taking effect of the Hepburn Act specific performance of this agreement could no longer be required.

That the prohibition applies with respect to transportation within the bounds of a State as part of an interstate journey is quite clear. *So. Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498, 527; *Ohio Railroad Comm.* v. *Worthington*, 225 U. S. 101, 110; *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336, 340.

In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error in performance of the contract of November, 1900.

But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map. The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the Act of Congress, the company thereupon became bound upon general principles of justice to pay him an equivalent in money for the balance of the consideration. In so holding the court was simply administering the applicable principles of state law, and did not run counter to the Act of Congress. If the court had accorded legal efficacy to an executory contract made after the taking effect of the Hepburn Act and contrary to its provisions, a different question would be presented. But there is nothing in the Act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation which the passage of the Act rendered thereafter illegal. In the *Mottley Case*, while the right to further specific performance of the contract for free passage was denied, the court said (219 U. S. 486): "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it."

Judgment affirmed.